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REMOVAL OF CRIMINAL PROSECUTIONS OF FEDERAL OFFICIALS: RETURNING TO THE ORIGINAL INTENT OF CONGRESS

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I. INTRODUCTION: THE PROBLEM

Our federal courts are overwhelmed with cases that do not involve federal questions. Although diversity jurisdiction is the main culprit,[1] there is another potential source of such cases.[2] Under 28 U.S.C. § 1442(a)(1),[3] federal officials may remove criminal prosecutions for acts committed "under color of office" to federal court.

This statute poses some interesting and serious problems. Con-

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1. *Time to Kill Diversity Jurisdiction?*, NAT'L L.J. 1 (Feb. 29, 1988).
2. *See* 28 U.S.C. § 1442(a) (1982).
3. 28 U.S.C. § 1442(a) (1982) reads as follows:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
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> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue;
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> (2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States;
>
> (3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;
>
> (4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

The procedure for removal is set forth in 28 U.S.C. § 1446. Upon receiving the petition, the district court must determine whether it presents a prima facie case for removal. If it survives this test, the court must hold an evidentiary hearing to determine whether removal is appropriate. 28 U.S.C. § 1446 (c)(4), (5) (Supp. I 1977). If the district court grants the petition, the case is tried in federal court using state substantive law and federal procedure. Where a federal defense is asserted; the trier of fact applies federal law to determine the scope of the defense and whether the facts support that defense.

sider the case of an FBI agent investigating a police chief for corruption. While driving to a meeting with a confidential informant placed within the police department, the agent is pulled over for a traffic violation. He is arrested when narcotics are allegedly found in his car. In light of section 1442(a)(1), what is the proper forum for the ensuing prosecution of the agent for speeding and possession of narcotics?

The problem is that section 1442(a)(1) does not define which cases require the supervision or protection of a federal court. Certainly, the statute should be construed to mandate federal court review of federal questions. Otherwise, state courts could frustrate federal law by explicitly or implicitly declaring federal law invalid. Thus, federal officials presenting defenses based upon federal statutes should be allowed removal.

But many routine criminal cases against federal employees present no federal questions. Consider the case of a postal worker who violates traffic laws while delivering the mail.[4] If "under color of office" encompasses all acts committed while on duty, then section 1442(a)(1) creates a special criminal court for federal officials. Although such an interpretation may provide federal employees with a measure of protection against local harassment, that reading also undercuts state sovereignty and burdens the district courts.

In sum, the problem is how to reconcile a legitimate need to remove certain cases to federal court with a state's right to enforce its criminal laws.

A. *There Is Great Potential for Abuse of the Federal Courts*

Federal officials should be allowed to remove cases to federal court in order to resolve federal questions. Federal courts should also be available where there is serious concern that the state prosecution was motivated by animus toward federal officials. Unfortunately, federal officials are removing other cases as well in order to gain a tactical advantage over local prosecutors.[5]

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4. California v. Mesa, 813 F.2d 960 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 1993 (1988), *aff'd*, 57 U.S.L.W. 4199 (U.S. Feb. 21, 1989) (No. 87-1206). Two cases were consolidated for purposes of appeal in *Mesa*. The named defendant was charged with vehicular manslaughter after the mail truck she was driving allegedly struck and killed a bicyclist. In the second and unrelated case, Shabbir Ebrahim (aka Azam) was charged with speeding and failing to yield after the mail truck he was driving struck a police car.

5. *See Mesa*, 813 F.2d at 961 n.1. For example, the Assistant United States Attorney in charge of the United States Attorney's Office that petitioned to remove the two traffic cases in *Mesa* stated that federal prosecutors routinely filed such petitions. "It was not an unusual practice; we did it as a matter of course. It's like playing on your home field." *Supreme Court*

The first tactical advantage is geographic. Removal to federal court may require local prosecutors to travel hundreds of miles to the nearest federal courthouse to prosecute minor offenses.[6] Prosecutors may be reluctant to expend the time and energy required to pursue a misdemeanor or infraction in federal court. Fewer witnesses will be willing or able to travel long distances.

Familiarity with the terrain and the players is also a major incentive for removal. Many federal employees are represented by the United States Attorney General's office,[7] whose attorneys are more comfortable in federal court. Most local prosecutors have never appeared in federal court.[8] Furthermore, defendants have nothing to

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Battle Pits State Against Feds, San Francisco Recorder, Dec. 2, 1988, at 1, col. 1.

The United States Department of Justice is allowed to represent federal employees at the employee's request under 28 C.F.R. § 50.15(a) (1982). According to the Department, United States Postal Service employees alone remove about sixty cases each year. Petition For Rehearing With Suggestion For Rehearing *En Banc* at n.3., *Mesa*, 57 U.S.L.W. 4199 (U.S. Feb. 21, 1989) (No. 87-1206). Although that number is small, there are no statistics available on how many cases are removed by federal employees represented by private counsel or proceeding pro se. Moreover, the low number may understate the problem. Removal without a federal defense was not available until the Third Circuit decided Pennsylvania v. Newcomer, 618 F.2d 246 (3d Cir. 1980). There is little public awareness of that decision. A Supreme Court decision or congressional amendment allowing removal of all traffic offenses involving federal officials while on duty could create a litigation explosion. Pro se litigants with distinctive and uninformed views about our Constitution and legal system could be expected to make a federal case out of a traffic ticket. The lure of "fighting that traffic ticket to the Supreme Court" might prove irresistible. *See* Virginia v. Harvey, 571 F. Supp. 464, 465 (E.D. Va. 1983).

Since traffic cases can be resolved relatively quickly in district court, removal under an expansive reading of section 1442(a)(1) might constitute more of an annoyance than a problem. However, *Mesa* was a vehicular manslaughter prosecution. Capital cases could also be removed, thus imposing a greater burden on district courts. *See id.*

6. In California, the county seat of Del Norte County is Crescent City. Crescent City is in the Northern District of California. The nearest federal court regularly used within that district is located over 350 miles away in San Francisco. Many other Northern California counties are located over 100 miles away from their respective federal district courts.

7. *See* 28 C.F.R. § 50.15(a) (1982). An interesting definitional problem arises when a criminal case is removed to federal court. Federal procedural statutes grant certain rights to "the Government." But is a state prosecuting a case in federal court "the Government," particularly when the United States Attorney General represents the defendant? Although the answer seems obvious, the Ninth Circuit fastened upon such a distinction in holding that Arizona could not appeal from a district court's grant of a judgment of acquittal because the language of the statute granting appellate jurisdiction referred only to the United States when allowing appeal by the prosecution. *See* Arizona v. Manypenny, 608 F.2d 1197 (9th Cir. 1979), *rev'd*, 451 U.S. 232 (1981). Although the Supreme Court reversed the Ninth Circuit, it did not resolve the issue of whether federal statutes referring to "the United States" or "the Government" apply to state prosecutors. *See Manypenny*, 451 U.S. at 244 n.18, 250-51 (Stevens, J., dissenting).

8. This factor can hardly be underestimated. Federal and state criminal procedure can be radically different, as in California. No attorney wishes to represent a client in a forum in which he has never practiced and with which he is completely unfamiliar. Local prosecutors are unfamiliar with either federal criminal procedure or local federal sentencing practices.

lose: they enjoy federal procedural protections in federal court while retaining all substantive protections available under their applicable state constitutions.[9]

But, removal in inappropriate cases imposes costs upon both federal and state governments. Federal courts are burdened with cases presenting no issues of federal law, including such minor matters as traffic citations.[10] This creates a substantial amount of work for federal judges, who are forced to integrate state substantive law with conflicting federal criminal procedure. Those conflicts raise issues of first impression and create errors requiring reversal or retrial.[11]

State governments suffer even greater harm. State sovereignty is invaded to satisfy nebulous, or even non-existent, federal interests.

Furthermore, many cases end in a negotiated plea-bargain. All protestations aside, a United States Attorney has an advantage in presenting his case to a judge before whom he appears daily.

9. *Manypenny*, 451 U.S. at 241. Federal protections may be greater than those provided by the states. For example, defendants charged with vehicular manslaughter in California are not entitled to a preliminary hearing under California law. However, federal procedure provides for such a hearing because the maximum penalty under California law is one year in jail. *See* Rules of Procedure For the Trial of Misdemeanors Before United States Magistrates, Rule 2(b)(7) (mandating a preliminary hearing for non-petty offenses unless defendant consents to trial before the magistrate). More important, defendants in cases removed to federal court are still entitled to all their protections under state law. *See* Aurora v. Erwin, 706 F.2d 295 (10th Cir. 1983).

10. *See* Puerto Rico v. Santos-Marrero, 624 F. Supp. 308, 311 (D.P.R. 1985).

11. *See Aurora*, 706 F.2d at 299-300 (holding that federal procedure impermissibly denied a defendant the right to a jury trial guaranteed under Colorado law). Although federal procedural rules are applicable to removed cases, *Aurora* held that such rules are superseded by any state procedural rule that is "substantive." The Tenth Circuit defined substantive rules as rules incorporating rights guaranteed by the state constitution. *Id. Aurora* thus requires each district court to study and interpret the applicable state constitution (itself a novel experience) and determine which procedural rules (e.g., trial by jury) are in fact substantive. The judge must then integrate those rules with federal procedural rules. A single mistake may well mandate reversal. *Id.* at 298-99. Furthermore, it is unclear whether the distinction between constitutional and statutory provisions suggested by the Tenth Circuit in *Aurora* correctly defines the standard. Many states have enacted their exclusionary rules as statutes, and earlier courts have given primacy to state rules on evidence, *voir dire*, and sentencing. *See* Virginia v. Felts, 133 F. 85 (C.C. Va. 1904).

Even if federal law is superseded only by that state law which is based upon a state constitution, any state retaining independent and adequate state grounds based upon its constitution may present conflicts with federal criminal procedure. State supreme courts have handed down at least 450 decisions based upon state constitutions which conflict with federal law, and the majority of those decisions involve criminal cases. Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 613 (1985-86) [hereinafter Collins]; Wermiel, *State Supreme Courts Are Feeling Their Oats*, Wall Street J., June 15, 1988, at 1, col. 1 (updating Collins); Collins & Galie, *Methodology*, NAT'L L.J. 58 (Sept. 29, 1988) (listing some of those cases sorted by category).

Local prosecutors unfamiliar with federal court may lose worthy cases. Even if the state secures a conviction, the defendant is sentenced by a federal judge unfamiliar with local sentencing practices. Thus, removal invades the state's ability to enforce the peace, "the centermost pillar of sovereignty."[12]

B. *The Supreme Court Resolves a Split Between the Circuits Over the Meaning of Section 1442(a)(1), But Does Not Reach a Crucial Issue*

In *Pennsylvania v. Newcomer*,[13] the Third Circuit interpreted section 1442(a)(1) broadly by holding that federal officials could remove criminal prosecutions arising out of acts committed while on duty without alleging a defense based upon federal law.[14] This interpretation allowed federal employees to remove routine traffic citations sustained while on duty. The circuit based its holding upon *Willingham v. Morgan*,[15] where the Supreme Court allowed removal of *civil* cases if the employee alleged that he acted while on duty.

But in *California v. Mesa*,[16] the Ninth Circuit declined to follow *Newcomer*. *Mesa* held that a defense based upon a federal law, a "federal defense,"[17] was required for removal by postal workers charged with routine traffic offenses.[18] The Ninth Circuit relied upon a 1926 case, *Maryland v. Soper (No. 1)*,[19] where the Supreme Court appeared to require a federal defense.

The Supreme Court recently affirmed the Ninth Circuit opinion in sweeping terms, but left a crucial issue unresolved.[20] The

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12. California v. Mesa, 813 F.2d 960, 966 n.12 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 1993 (1988), *aff'd*, 57 U.S.L.W. 4199 (U.S. Feb. 21, 1989) (No. 87-1206). *See* Kelly v. Robinson, 479 U.S. 36, 47-49 (1986); Younger v. Harris, 401 U.S. 37, 46 (1971).

13. 618 F.2d 246 (1980).

14. *Id.* at 250.

15. 395 U.S. 402 (1969).

16. 813 F.2d 960 (1987).

17. As discussed in later sections, the term "federal defense" is defined here as any defense relying upon federal law. This includes cases where the official claims that all his acts forming the basis of his prosecution were protected by federal law. Thus, an act of self-defense required to prevent interference with federal law or occasioned by enforcement of such law gives rise to a "federal defense" because the official claims that all his acts were necessary and proper under the federal law defining his duties. *See* Maryland v. Soper (No. 2), 270 U.S. 36, 46 (1926); Tennessee v. Davis, 100 U.S. 27, 261 (1879).

18. *Mesa*, 813 F.2d at 967.

19. 270 U.S. 9 (1926). This case is designated as *Soper (No. 1)*. The companion case, Maryland v. Soper, 270 U.S. 36 (1926), is referred to as *Soper (No. 2)*.

20. *Mesa*, 57 U.S.L.W. 4199 (U.S. Feb 21, 1989) (No. 87-1206).

Court held that federal officials must aver a federal defense as a condition of removal.[21] However, the Court left open the possibility that an official lacking a federal defense, such as the FBI agent charged with speeding and narcotics possession, could obtain removal by claiming that the prosecution was motivated by animus toward federal officials.[22]

The Court's decision not to resolve that issue is understandable, as the federal defense requirement is incompatible with removal of claims of malicious prosecution. A claim of malicious prosecution, or "harassment," does not by itself raise a federal defense because the official does not necessarily claim that his acts were protected by federal law.[23] Accordingly, claims of harassment do not necessarily allege that the official's conduct was within the purview of section 1442(a)(1). Thus, insistence upon a "federal defense" requirement for removal appears to allow states to harass federal officials.

In contrast to the Supreme Court's opinion in *Mesa*, both the Third and Ninth Circuit decisions addressed the harassment issue, albeit unsatisfactorily. The Third Circuit dispensed with the federal defense requirement on the theory that Congress intended section 1442(a)(1) to allow removal whenever the official allegedly committed the act charged while on duty.[24] Providing for removal of any case where the official was on duty would allow removal of most malicious prosecutions. Unfortunately, the Third Circuit's standard would also create a special federal court for federal employees. Moreover, local law enforcement inclined toward malicious prosecution could simply harass the official after he left work (e.g., by prosecutions for vagrancy, building code violations, or possession of narcotics at home).

The Ninth Circuit opinion in *Mesa* was also flawed.[25] Although the Ninth Circuit required a federal defense, a close reading of that opinion would allow a district court to waive the requirement whenever it appeared that the importance of the federal interest asserted justified the invasion of state sovereignty.[26] Such an approach

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21. *Id.*

22. *Id.* at 4204-05 (Brennan, J., concurring); *see infra* text accompanying notes 146-60.

23. For example, a state could charge an official for reckless driving where the official had not even been driving a car. The official's defense to the charge under such circumstances could not be based upon federal law. And, as discussed later, this problem is difficult because the official's simple denial of the charges does not present a federal defense allowing removal. *See infra* text accompanying notes 76-162.

24. Pennsylvania v. Newcomer, 618 F.2d 246, 250 (3d Cir. 1980).

25. *Mesa*, 813 F.2d at 967.

26. *Id.*; *see infra* text accompanying notes 133-45.

would interfere with state sovereignty and produce unpredictable results.

Thus, given these lower court opinions and the Supreme Court's failure to address it, the "harassment" issue still awaits resolution.

C. *Resolving the Problem*

The harassment problem exists because the courts have ignored the original intent of Congress. The federal official removal statute was only intended to ensure that federal courts could prevent misinterpretation or defiance of federal law by state courts. Congress never intended to grant removal to officials claiming harassment, but instead contemplated that those officials would seek a writ of habeas corpus. Accordingly this article contends that removal should be reserved for federal defenses and that habeas corpus should be used to resolve harassment claims.

In reaching this conclusion, this article first reviews the history of section 1442(a)(1) and the evidence demonstrating that Congress always intended to require a federal defense for removal. This article notes the legislative history which suggests that Congress did not contemplate harassment as a grounds for removal. The article then turns to the cases interpreting section 1442(a)(1) in its various enactments, and suggests that the Third Circuit's incorrect decision was an outgrowth of confusing Supreme Court decisions.

The article next examines whether the federal defense requirement is mandated by the Constitution. Although the Supreme Court in *Mesa*[27] correctly reaffirmed the federal defense requirement based upon its own precedent, the Court was also presented with the argument that article III jurisdiction depends upon the presence of a federal defense. The Court noted that the lack of a federal defense in *Mesa* posed a "grave constitutional problem," but elected to avoid resolving the issue.[28] That decision may prove unfortunate. The federal government may seek additional protection for federal officials by asking Congress to eliminate or relax the federal defense requirement. The article suggests that such legislation would impermissibly expand federal court jurisdiction beyond the boundaries of article III.

Finally, this article suggests that Congress intended the writ of habeas corpus as the appropriate remedy for harassment of federal

27. 57 U.S.L.W. 4199 (U.S. Feb 21, 1989) (No. 87-1206).
28. *Id.* at 4204.

officials. Recent appellate court decisions and procedural differences between the two remedies also suggest that the writ is the best vehicle for resolving harassment claims.

II. THE HISTORY OF SECTION 1442(A)

The history of the federal official removal statute indicates that Congress used the remedy sparingly, as befits a threat to state sovereignty. From the outset, Congress crafted the removal statute as a limited remedy to protect certain federal laws from state misinterpretation or defiance. Congress periodically reenacted removal statutes protecting different classes of federal officials only when the laws which those officials enforced were the subject of state hostility. Protecting federal officials who enforced federal law was the only mechanism available to protect the law itself. Congress provided for removal to protect enforcement of federal law, not to allow federal officials to remove all torts or crimes committed while on duty. The history of the statute suggests that Congress never changed its focus from protecting federal law to extending jurisdiction to all cases involving federal employees.

A. *The Judiciary Act of 1789*

Removal is grounded in the constitutional provision of federal jurisdiction. Article III, section 2 vests the judicial power in the Supreme Court and lower courts established by Congress over all cases arising under the Constitution and the laws of the United States. It follows that a mechanism must be available for transferring such cases from state to federal courts. But the Constitution does not define that mechanism.

Congress created inferior courts by enacting the Judiciary Act of 1789.[29] That Act also provided for removal of certain *civil* cases to federal courts where Congress believed that local prejudice would preclude a fair hearing.[30] Congress did not include a separate provision for removal of suits against federal officials. The Act provided

29. Act of September 24, 1789, ch. 20, 1 Stat. 79, 85 (1789) [hereinafter Judiciary Act].

30. *Id.* The Act implemented the federal diversity jurisdiction provided under article III, section 2. Article III provides diversity jurisdiction apart from the grant of jurisdiction over all cases arising under the laws or Constitution of the United States. This separate constitutional provision for civil diversity jurisdiction was necessary because such civil suits would not present issues of federal law. Note that the Framers did not include an additional exception for suits involving federal officials, even though they provided special grants of jurisdiction in article III for cases involving other groups (i.e., ambassadors and aliens). U.S. CONST. art. III, § 2.

for removal after trial *only* where federal law had been declared invalid by a state.[31]

However, even that modest intrusion into state jurisdiction was challenged as unconstitutional shortly after Congress enacted the first federal official removal statute in 1815.[32] That this issue was not so well-settled as to discourage the Virginia Supreme Court's attack suggests that Congress would have been inclined to draft the most restrictive removal statute possible.

B. *The First Federal Official Removal Statute*

The legislative history of the first federal official removal statute demonstrates that it was only a modest and temporary extension of the Judiciary Act. During the War of 1812, the federal government found its embargo on trade with England ignored by New England states. The Act of 1815 ("An Act to prohibit intercourse with the enemy")[33] was proposed to aid and protect federal customs agents in enforcing the embargo.[34]

The only available piece of legislative history consists of a letter to Congress from the Secretary of the Treasury providing Treasury's views on the purpose of the statute.[35] The Secretary noted that the Customs Office was headed by a handful of "collectors." Subordinate to those collectors were the more numerous customs inspectors, who were charged with inspecting ships and seizing contraband concealed on ship or shore.

Inspectors were immune from suit where they proved that they enjoyed the authority to search and that a particular search was sup-

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31. A final judgment, or decree, in any suit, in the highest court of law or equity of a State, in which a decision of the suit could be had, *where is drawn in question the validity of an authority, exercised under the United States, and the decision is against the validity*, may be re-examined, and reversed, or affirmed, in the supreme court of the United States, upon a writ of error; but the matter in dispute must exceed the value of two thousand dollars, exclusive of costs.

Judiciary Act, *supra* note 29, at 85 (emphasis added).

32. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816), the Virginia Supreme Court held that the appellate jurisdiction of the United States Supreme Court as defined in the Judiciary Act did not encompass review of state court decisions. The United States Supreme Court reversed, holding that such jurisdiction was created by article III and that removal jurisdiction was coextensive with that provision. It should be noted that the challenge was not raised by the Virginia Supreme Court until after Congress had enacted the federal official removal statute. *Id.*

33. Act of February 4, 1815, ch. 31, 3 Stat. 195, 198 (1815) [hereinafter 1815 Act].

34. 28 ANNALS OF CONG. 758-61 (1814) [hereinafter ANNALS].

35. ANNALS, *supra* note 34, at 757-61 (also appearing in the American State Papers, 1802-15, Finance, at 881).

ported by probable cause. The Secretary explained that courts had always ruled that inspectors, in addition to collectors, possessed such authority as part of their inherent powers. However, the State of Vermont attempted to defeat the embargo by refusing to acknowledge the authority of the inspectors. The Secretary related that several Vermont courts had ruled that inspectors were not authorized to search for contraband, but were only allowed to conduct routine inspections. When an inspector suspected that a ship was carrying contraband, those courts required that one of a handful of collectors specifically appoint an inspector to execute a search. Inspectors who searched without such appointment were held civilly liable. These rulings made it impossible for the small number of collectors to delegate their duties and severely hampered the Treasury's attempts to curtail smuggling in the New England states.[36]

The Secretary wanted to extend the Judiciary Act of 1789 to ensure enforcement of the federal customs laws in the face of these decisions misconstruing federal law. But under the Judiciary Act, civil cases could only be removed to federal courts *after* the judgment was rendered against the inspector in the *highest* court in the state.[37] This delay meant that states could forestall federal review until after the war ended and could obstruct customs officials without interference. The Secretary wanted to amend the Act to allow removal of civil cases before adjudication by any state court.[38]

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36. ANNALS, *supra* note 34, at 758-59.

37. Judiciary Act, *supra* note 29.

38. The Secretary first noted that the Judiciary Act only allowed removal of decisions to the Supreme Court after judgment, quoting the Act's provision allowing removal "where is drawn in question the validity of an authority . . . and the decision is against the validity." ANNALS, *supra* note 34, at 760. The Secretary only intended to adjust the Judiciary Act for the duration of the war to allow immediate transfer to federal court of state challenges to federal law authorizing searches and seizures by customs inspectors; he did not intend to expand federal jurisdiction dramatically.

"A more effectual provision should be made for transferring, from the State courts to the Federal courts, suits brought against persons ***exercising an authority under the United States***, so that such suits may be transferred, as soon as conveniently may be, after they are commenced." ANNALS, *supra* note 34, at 761 (emphasis added).

The Secretary's letter did not refer to criminal prosecutions. Apparently, Vermont chose to obstruct federal authority by making customs officials liable for damage suits. "That, limited as the general powers of the revenue officers appear to be, they are rendered still more inadequate by the terror which the officers now feel, of being exposed to suits for damages . . . ." ANNALS, *supra* note 34, at 758. The Secretary used the terms "suit" and "prosecution" interchangeably to denote civil suits. Thus, when describing the protection afforded inspectors by federal law, he spoke of suits and prosecutions for damages

> [i]n the performance of their duties, the inspectors, in common with the other officers of the customs, are protected by the law, when unjustly sued or molested, *in actions for damages*; and when any prosecution is commenced, on

Congress acted upon that request by passing the 1815 Act, which allowed for removal of any suit or prosecution

> against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, *agreeable to the provisions of this act, or under colour thereof*, for any thing done, or omitted to be done, as an officer of the customs, *or* for any thing done by virtue of this act or under colour thereof.[39]

The resulting language was quite broad and seemed to belie the Secretary's modest request. The phrase "for any thing done . . . as an officer of the customs, *or* for any thing done by virtue of this act or under colour thereof" could be read as allowing removal for all acts committed while on duty as a customs official.[40] Furthermore, such a statute might be read as precluding state authorities from harassing customs officials by other judicial means.

However, reading the removal provision as a whole suggests a more restrictive intent. Only those acts "agreeable to the provisions of this act or under colour thereof" were covered. Thus, only those acts which might be defended by recourse to the remainder of the Act (enumerating the powers of customs agents) could be the basis for removal.[41] This interpretation is consistent with the Secretary's request. Although the 1815 Act only protected against misinterpreta-

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> account of the seizure of any ship, or goods, *in which judgment is given* for the claimant, the inspectors are released from all responsibility, on showing that there was a reasonable cause of the seizure.

ANNALS, *supra* note 34, at 759 (emphasis added).

39. 1815 Act, *supra* note 33, § 8 (emphasis added). Although the Secretary apparently did not consider the problem of criminal prosecutions, the text of the Act indicates that Congress intended "prosecutions" to mean criminal prosecutions. 1815 Act, *supra* note 33, § 8 (requiring that petitioner post with the state court such bail as was originally required in that court; that section also prevented the state from appealing an acquittal of defendant in state court).

40. However, acts committed while off-duty would not be protected in any case because of the requirement that the act have been committed as an officer of customs. 1815 Act, *supra* note 33, § 8.

41. 1815 Act, *supra* note 33, §§ 1-2, 4-6. The structure of the Act supports such a reading. It is difficult to conclude that Congress specifically enumerated certain customs officers as falling under the statute, set forth their powers, specifically allowed those officers to remove for acts "done by virtue of this act or by colour thereof," and then also allowed them to remove without comment all cases arising out of miscellaneous minor torts and crimes unrelated to their duties.

Finally, this author is unaware of any reported cases arising under the 1815 Act, which expired in 1821. *See infra* note 43. Surely such a broad construction would have provoked widespread comment and litigation. The only published discussion of the statute occurs in a Supreme Court brief filed in Osborn v. Bank of the United States 22 U.S. (9 Wheat.) 738 (1824). That brief implies that a federal defense was required. *See infra* note 174.

tion or defiance of federal law, that was the only threat posed by Vermont. There is no indication in the Secretary's letter that Vermont was arresting federal officials on trumped up charges; the danger came from adverse *civil* rulings.[42] Moreover, any person enforcing the Act was covered, even if that person was not a federal official. Thus, Congress did not intend to protect all acts of federal officials without regard to a federal defense. The focus of the 1815 Act was on the authorized activity, not on the actor's status.

C. *The Re-enactment of the 1815 Act to Protect Federal Tariffs*

The 1815 Act was a temporary measure which expired after the War of 1812[43] to lie dormant until the next crisis. South Carolina's passage of the Nullification Act in 1832 rekindled the need for removal to protect federal law. The Nullification Act declared federal tariff laws unconstitutional and authorized criminal prosecution of federal revenue agents attempting to collect such tariffs. As part of the federal response, President Jackson requested the "revival" of the 1815 Act with minor modifications. Jackson's proposed law originally allowed removal, not only for acts under color of the revenue laws, but for acts under color of *any* United States law.[44] However,

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42. *See supra* note 38. Congress was taking a very large step just by including criminal prosecutions. The Judiciary Act of 1789 did not provide for such removal, although article III, section 2 made no distinction between civil and criminal cases. As of 1815, whether such cases could be removed was still an open question; the issue was not completely resolved until the Supreme Court held in 1821 that the federal judicial power extended to state criminal prosecutions. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). This also suggests that Congress did not enact a statute designed to "expand" along with federal jurisdiction. There was no reason for Congress to believe that federal jurisdiction would expand, not just to criminal cases in state courts, but to include cases raising no federal question. In addition, there was no reason to believe that states would begin harassing federal officials by bringing criminal charges against them unrelated to their enforcement of federal law.

Had Congress wished to provide the fullest extent of protection consistent with future expansion of article III jurisdiction, one would expect to find a debate on the breadth of the Act in the official reports. But the only legislative history appears to be the Secretary's letter.

43. The Act expired by its terms at the end of the War, but its removal provisions were re-enacted in 1817 and remained in force for another four years. *See* Act of March 3, 1817, ch. 109, 3 Stat. 396 (1817); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 254 (1867).

44. It may therefore, be desirable to revive, with some modifications better adapted to the occasion, the 6th section of the act of the 3d of March, 1815 . . . to provide that, in any case where suit shall be brought against *any individual* in the courts of the State, *for any act done under the laws of the United States*, he should be authorized to remove the said cause . . . .

22 ANNALS OF CONG. 145, 153 (1817) (emphasis added) (President Jackson's message to Congress).

President Jackson did *not* suggest that all federal officials be protected, or that all acts committed while on duty be immunized from state court review. Rather, he was intent upon

at some point in the legislative process the proposal was narrowed to encompass only revenue laws.

The Senate debate demonstrates that Congress did not intend to expand federal jurisdiction radically. Senators linked the statute with the necessity that federal courts adjudicate federal questions in order to circumvent state hostility to federal law. As discussed by Senator Daniel Webster, the Act was adopted to "give a chance to the officer to defend himself *where the authority of the law was recognised.*"[45]

The debates over this statute demonstrate the relationship between protection of federal law and prevention of harassment of federal officials. Congress was motivated by the need to protect federal law and federal authority. Those who exercised that authority had to be protected against state courts refusing to recognize federal law. Removal to courts that would uphold defenses based upon federal law was the answer. Although protection against generalized harassment was a concern, the focus at the time was on state laws that punished the enforcement of federal law. There was no suggestion that the state was initiating prosecutions against federal officials for acts other than the attempted enforcement of the federal tariff.[46]

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protecting only those individuals (not necessarily federal officials) prosecuted for enforcing federal law.

45. 22 ANNALS, *supra* note 44, at 461 (remarks of Senator Daniel Webster) (emphasis added). Senator Dallas also contemplated the statute as frustrating any attempts by a state to preclude an official from "appealing to the constitution and laws under which he acted." 22 ANNALS, *supra* note 44, a 419. The issue prompting his comment was whether to postpone removal until after the state's highest court had interpreted the federal tariff law in each case, as contemplated by the Judiciary Act of 1789, so as to avoid a conflict of jurisdiction injurious to South Carolina's dignity. Senator Forsyth noted that postponement would create conflicting rulings by state and federal courts, and that federal officials would bear the brunt of enduring such decisions until federal court review.

Senator Wilkins noted that the burden was particularly heavy because the Nullification Act made the request for an appeal a crime punishable by fine or imprisonment. Senator Webster's comment suggested that since the federal official's defense rested on the validity of the tariff and invalidity of the Nullification Act, jurors sworn to follow that Act would not give the official a fair trial because they would refuse to honor the federal defense. Thus, removal was necessary to uphold federal law.

Senator Webster believed that the removal provisions should remain in place after the end of the crisis to protect against future collisions between state and federal judicial systems. 22 ANNALS, *supra* note 44, at 419. He did not suggest that such provisions were intended to protect all federal officials while on duty; he was only interested in protecting federal law from state court adjudication. 22 ANNALS, *supra* note 44, at 419.

46. Even the habeas corpus provision enacted as part of the Act was confined to acts "done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court . . . ." Act of March 2, 1833, ch. 57, 4 Stat. 632, 634 (1833) [hereinafter 1833 Act]. A malicious prosecution of a federal official for littering would not have been on account of an act "in pursuance of a law of the United States," although it would have violated the Supremacy Clause. Yet, Congress did not add constitutional violations to the lan-

The Act of March 2, 1833,[47] tracked the language of the 1815 Act, but unambiguously stated that removal depended upon a federal law defense. It provided:

> in any case where suit or prosecution shall be commenced . . . against any officer of the United States, or other person, *for or on account of any act done under the revenue laws of the United States, or under colour thereof*, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States . . . .[48]

Thus, the identity of the actor or his status as an on or off-duty official was not important; the issue was whether his defense relied upon federal law.[49]

D. *Removal During the Civil War*

The next removal statute was enacted during the greatest conflict between federal and state governments: the Civil War. As part of the 1863 Act suspending the writ of habeas corpus, Congress provided for removal of suits and prosecutions

> against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress.[50]

This statute by its terms required a federal defense based upon

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guage of the writ statute until 1867. *See infra* note 211. Congress surely would have included such a provision in 1833 had there been a problem with prosecutions unrelated to the officials' enforcement of federal law.

47. 1833 Act, *supra* note 46, at 632.

48. 1833 Act, *supra* note 46, at 633 (emphasis added). The use of the language "under colour of" was probably intended to cover situations where the officer's defense did not depend directly upon a particular revenue law, but alleged that the act (e.g., assault) was made necessary by resistance to his authority, such that his act was in protection, or "under colour of" federal authority. *See supra* note 17.

49. Thus, even if the 1815 Act could be read broadly, there is no reason to believe that Congress would have first greatly expanded jurisdiction, only to contract it at a time of crisis. Moreover, at least one court made clear its assumption that the official must allege a federal defense in his petition for removal. *See* Salem & L.R. Co. v. Boston & L.R. Co., 21 F. Cas. 229 (C.C. Mass. 1857).

50. Act of March 3, 1863, ch. 80, 12 Stat. 755, 756 (1863) [hereinafter 1863 Act]. This statute was later amended to prohibit state courts from evading the removal provisions. *See* Act of May 11, 1866, ch. 80, 14 Stat. 46 (1866). Those amendments merely closed technical "loopholes" in the statute and do not bear on the issues discussed in this article.

federal law or authority. There was no room for quibbling; even its opponents assumed that removal required a federal issue per article III, section 2.[51] The debates also reveal that congressional concern over harassment was still directed toward improper adjudication of federal defenses by state courts.[52]

The 1863 Act was the first federal official removal statute discussed by the Supreme Court. In *The Mayor v. Cooper*,[53] the Court sustained the constitutionality of the Act where federal officials had obtained removal by alleging a federal defense. The Court held that the statute was constitutional only because it required a federal defense. While the Court did not speak directly to the intent of Congress, it reiterated the constitutional limits to federal jurisdiction that had guided Congress in enacting the removal statute.[54]

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51. Although the constitutionality of the Act was hotly debated, all agreed that a federal defense was a precondition to removal. The issue posed was whether to allow removal in criminal, as well as civil, cases. *See* CONG. GLOBE, 37th Cong., 3d Sess. 535-37 (1862). Senators opposing removal for criminal cases suggested that such cases could be retained by the state court while the federal question (i.e., federal defense) presented could be removed to federal court for a ruling. Should the federal court rule against defendant, the state court would proceed to try defendant for the charged offense against state criminal law. *Id.*

Those Senators opposing the Act argued that allowing removal of the entire criminal case would require federal courts to act as state courts (to try state criminal charges), and that such "usurpation" of state court functions would be an unconstitutional assertion of federal jurisdiction outside the ambit of article III, section 2. *Id.* Other Senators maintained that the 1815 Act provided precedent for removing criminal cases. Although Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), was cited, no other cases from that period were referred to in the debate. CONG. GLOBE, *supra*, at 535-37.

52. Although federal officials were harassed by frivolous lawsuits sustained by biased judges, those suits were based upon acts performed by the officials in enforcement of federal law during the Civil War. While the debate in Congress indicates concern that federal officials would not receive fair trials in state courts, that concern was founded on the power of state courts to negate federal defenses through their fact-finding powers. Federal appellate review of state court decisions would be inadequate because many federal defenses depended upon findings of fact (e.g., whether a warrant was based upon probable cause). Even while purporting to respect federal law, state courts could find that the evidence presented by the federal official was insufficient to support that defense. Such fact-finding could effectively thwart federal authority. *See* CONG. GLOBE, *supra* note 51, at 538-39 (colloquy between Senators Cowan and Carlisle); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 808-10, 820-25 (1965). But Congress was concerned about hostility to the federal defense, not undifferentiated hostility to all federal officials. There is no evidence that Congress intended to allow removal of cases presenting no federal issue. However, Congress did expand the writ of habeas corpus in 1867 to include any violation of the Constitution. *See infra* note 211. As discussed in a later section, this expansion suggests that Congress intended the writ to counter harassment in the absence of a federal defense. *See infra* notes 207-14 and accompanying text.

53. 73 U.S. (6 Wall.) 247 (1867). The Court construed the 1863 Act as amended by the Act of May 11, 1866. *See supra* note 50.

54. Nor is it any objection that questions are involved which are not all of a

The Court reaffirmed its position in *McKee v. Rains.*[55] *In McKee,* a United States Marshal was sued for trespass after entering a dwelling and seizing property pursuant to a writ of execution. The official relied upon the 1863 Act to support removal. The Court remanded the case because "[n]o Act of Congress has been cited from which authority can be derived to the Marshal of any court of the United States to seize the goods of one person for the satisfaction of the debts of another."[56] Thus, the Court made explicit the requirement that a federal official must base his defense on a federal law.[57]

E. *The Internal Revenue Removal Statute of 1866*

The next removal statute to be enacted was part of a general internal revenue law. Congress enacted the revenue statute in 1864; that statute was amended in 1866 and 1874.[58] The removal provisions of the 1866 amendment are especially interesting because they included for the first time the phrase "under color of office."[59] Al-

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> Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction. "A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the right construction of either."

Cooper, 73 U.S. (6 Wall.) at 252-53 (citations omitted).

The Court continued its analysis by stating that removal was necessary to protect federal law, and indirectly federal officials, from adverse state tribunals. *Id. See also* The Justices v. Murray, 76 (9 Wall.) 274, 279 (1869) (finding removal after jury trial to be prohibited by the 7th amendment), where the Court noted that each case under the 1863 Act involves "*questions* arising under the Constitution, the laws of the United States, and treaties, or under some other Federal authority . . . . The case must be one involving some Federal *question* . . . ." *Id.* at 279 (emphasis added).

55. 77 U.S. (10 Wall.) 22 (1870).

56. *Id.* at 25.

57. Although the Marshal was clearly exercising federal authority by enforcing a court order, the 1863 Act required that the official act under authority "derived from or exercised by or under the President of the United States, or any Act of Congress." *See supra* text accompanying note 50. Court orders were held not to be covered by the Act. This problem prompted Congress to add section 1442(a)(3) in 1916. *See infra* text accompanying notes 65-71.

58. The 1833 Act applied only to collection of duties on imports. The Internal Revenue Act of June 30, 1864, ch. 173, 13 Stat. 233, 241 [hereinafter 1864 Act], provided that the 1833 Act was to "be taken and deemed as extending to and embracing all cases arising under the laws for the collection of [revenue]." That provision was repealed and replaced in 1866 with a different removal statute. *See* Act of July 13, 1866, ch. 184, 14 Stat. 98, 171 [hereinafter 1866 Act]; Gay v. Ruff, 292 U.S. 25, 32 n.8 (1934).

59. That in any case, civil or criminal, where suit or prosecution shall be commenced in any court of any State against any officer of the United States, appointed under or acting by authority of [the 1864 Act], or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against any person holding property or estate by title

though Congress did not specify the meaning of the phrase, the legislative history does not suggest that the new language signalled an expansion of federal jurisdiction.[60]

The Supreme Court's view of the meaning of the removal statute remained the same. In *Tennessee v. Davis*,[61] the Court again assumed that a federal defense was a prerequisite to removal.

> It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offenses against State laws from State courts to the circuit courts of the United States, *when there arises a Federal question in them*, is as ample as its power to authorize the removal of a civil case. . . .
>
> When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offenses against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts.[62]

Again, the Supreme Court was not explicit about the federal defense requirement because such a constitutionally based limit was

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derived from any such officer, concerning such property or estate, and affecting the validity of this act or acts of which it is amendatory . . . [the case may be removed].

1866 Act, *supra* note 58, § 67.

60. Both the 1815 and 1833 Acts also allowed removal on account of any act done under the laws, "or under colour thereof." The 1863 Act referred to acts "under color of authority." The 1866 Act referred to officers appointed under the revenue laws. Their actions as officers in reliance upon their authority under those laws were acts "under color of office." The change from "under color of law" to "under color of office" appears to have been merely stylistic. The Notes accompanying this section in the Statutes At Large state that it covers "all suits against revenue officers, or persons acting under them *and affecting the validity of this act* . . . ." 1866 Act, *supra* note 58, at 171 (emphasis added). Although the statute could be read as allowing removal for any act committed by an officer appointed under the revenue laws, that reading would render the next few words superfluous ("appointed under *or acting by authority*"). It appears that Congress simply omitted a comma after the clause "any person acting under or by authority of such officer." There is no legislative history suggesting that Congress intended to change the removal statute.

The 1866 Act was codified in 1874 and appears as section 643 of the Revised Statutes. The only change made in 1874 was the insertion of the words "or of any such law" in the phrase "on account of any act done under color of his office *or of any such law*." 1866 Act, *supra* note 58, at 171. (emphasis added). *Compare* 1866 Act, supra note 58, at 171, *with*, § 643, Revised Statutes of 1874. It could be argued that the addition of the phrase indicates that "under color of office" meant something different from "under color of the law." However, there is no legislative history explaining the addition.

The section was recodified with no changes at JUD. CODE OF 1911, 36 Stat. 1097. None of these statutes expanded federal jurisdiction. *See Ruff*, 292 U.S. 25 (1934).

61. 100 U.S. 257 (1879) (construing section 643 of the Revised Statutes of 1874).

62. *Id.* at 271-72 (emphasis added).

obvious; the issue was whether the Constitution allowed removal of federal defenses in criminal cases at all. Although the Court noted the importance of protecting Federal officials from state hostility, it based its decision upon the judicial power of the Federal government to prevent state adjudication of federal law, specifically the federal immunity defense.[63]

F. *The Removal Statute Changes on Its Face*

The first significant amendment[64] to the removal statute occurred in 1916 with the addition of section 1442(a)(3), allowing a court officer to remove civil and criminal actions "for or on account of any act done under color of his office *or in the performance of his duties as such officer.*"[65] This is the most significant piece of legislative history supporting the federal defense requirement. The apparent distinction between acts "under color of office" and "in performance of duties" created by section (a)(3) indicates that merely being on the job will not support removal for any official except court officers. Otherwise, section (a)(3) would be superfluous because court officers could remove all such cases under section 1442(a)(1).

However, the phrase "in performance of duties" in section 1442(a)(3) also poses a problem because it suggests that Congress was willing to exceed the traditional barriers of article III jurisdiction alluded to above in order to protect court officers even in the absence of a federal question. But the legislative history of section (a)(3) indicates that even court officers may remove only when they base their defense upon the federal authority underlying the court order.

The 1911 Revised Statute had confined removal to acts committed pursuant to the revenue laws. Court officers executing court orders in such cases could remove to federal court under section

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63. *Id.* at 263, 266. The official in *Davis* relied upon a federal immunity defense by alleging that his acts of self-defense were necessary and proper to his enforcement of federal law. *See* Maryland v. Soper (No. 2), 270 U.S. 36, 42 (1926) (acts of self-defense are "part of the exercise of official authority"). *See also* Amsterdam, *supra* note 52, at 874 n.328 (1965); D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT, THE FIRST HUNDRED YEARS, 1789-1888 393-94 n.172 (1985).

64. 28 U.S.C. § 1442(a)(2) (1982), allowing removal to property holders whose title is based upon "any law of the United States," was added as part of the 1866 Act, *supra* note 58. *Id.* It is not relevant to our discussion because it so clearly requires a federal issue for removal. Section 1442(a)(4) was added by the Act of March 3, 1875, ch. 130, § 8, 18 Stat. 371, 401, and is discussed below.

65. Act of August 23, 1916, ch. 399, § 33, 39 Stat. 532 (emphasis added) [hereinafter 1916 Act].

1442(a)(1) by raising a federal immunity defense based upon their duty to enforce those laws. However, court officers executing court orders where the underlying authority for the order was *not* a revenue law were held to be unprotected by section 1442(a)(1). The Supreme Court held in a series of cases that federal law did not protect those court officers when sued in state court for a variety of torts even though those suits were based upon the officer's execution of a court order.[66] The federal immunity defense, and thus removal, was unavailable to those court officers.

Congress sought to provide court officers with the same protection afforded revenue officers *and* members of Congress.[67] Since revenue officers were allowed to remove acts committed "under color of office," that phrase was also included within section 1442(a)(3). But additional protection was needed because of the Court's decisions holding that federal law did not provide a defense to suits challenging the marshal's execution of court orders. Section 1442(a)(4), added in 1875, allowed members of Congress to remove any suit on account of "any act in the discharge of his official duty *under an order of such House.*"[68] Congress incorporated this protection of all acts committed pursuant to federal authority into section 1442(a)(3) by adding the phrase "in performance of duties." Thus, "in performance of duties" allows removal based upon the authority underlying the federal court order.

This conclusion was confirmed by the Supreme Court in *Gay v. Ruff*.[69] Defendant in *Ruff* was a receiver appointed by federal court order to run a railroad. Plaintiff sued the receiver for the death of his son allegedly caused by the negligent operation of a train by railroad employees. The receiver sought removal under section 1442(a)(3) based on his having been a federal court officer when the incident occurred. The Court held that the receiver was a court officer for purposes of section 1442(a)(3). But the Court also noted that the case was dissimilar to cases removable under section 1442(a)(3) because no federal questions were presented. The Court held that Congress only intended "in performance of duties" to protect court officers relying upon the federal authority embodied in the court order and denied removal. The Court's decision was inconsis-

66. *See* McKee v. Rains, 77 U.S. (10 Wall.) 22 (1870); Bigelow v. Forrest, 76 U.S. (9 Wall.) 339, 348 (1869); Buck v. Colbath, 70 U.S. (3 Wall.) 334, 342-44 (1865).

67. *See* Gay v. Ruff, 292 U.S. 25, 38-39 (1934) (quoting House Judiciary Committee report).

68. 28 U.S.C. § 1442(a)(4) (1982) (emphasis added).

69. 292 U.S. 25 (1934).

tent with the theory that "under color of office" included all acts committed while on duty. Under that theory, the receiver in *Ruff* should have been allowed removal because he was accused of negligence in performing his duties. But *Ruff* held that the receiver could not have been acting "under color of office" under section 1442(a)(3) because he had no federal defense.[70]

This narrow reading of section (a)(3) protected article III jurisdiction by limiting removal to cases implicating the Supremacy Clause. It precluded state courts from hearing disputes involving the obstruction or violation of federal court orders because state courts could render the orders unenforceable by ignoring violations. But other suits involving no federal issues would still be heard by state courts because of article III.[71]

G. *The Modern Federal Official Removal Statute*

Congress amended section 1442(a)(1) to include "[a]ny officer of the United States or any agency thereof" as part of the Revision of the Judicial Code in 1948. The statute still allowed removal for acts "under color of such office."[72] The Reviser's Note to that section stated that the amendment merely extended the right to remove to all federal employees.[73] There is no evidence that the meaning of the phrase "under color of such office" changed, or that recodification abolished the federal defense requirement.[74] Since it is unlikely that

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70. *Id.* at 39 ("Nor is there reason to assume that he will in this case rest his defense on his duty to cause the train to be operated.").

71. The Supreme Court's interpretation in *Ruff* may still allow removal of suits charging that the receiver negligently failed to perform the duties entrusted to him by the court. *See* Ely Valley Mines v. Hartford Acc. & Indem. Co., 644 F.2d 1310 (9th Cir. 1981). This result is somewhat troubling. Since most orders appointing a receiver will simply require him to manage a certain entity faithfully and well, negligence suits in practice will not raise issues involving the interpretation of those orders. It appears that each case must be decided based on whether a party raises such issues. *Ely Mines* involved such issues (alleged failure to account per court order, refusal to obey Ninth Circuit order to return property, etc). *Id.* at 1312. Courts should resist the temptation to construe that case broadly to allow removal of all suits involving receivers.

72. The amendment inserted the word "such." *See* 23 U.S.C. § 1442(a)(1) (1982). If the additional word changes the meaning of the phrase, it appears to emphasize the requirement that the officer demonstrate that his act rely on the power of that office for its legitimacy.

73. 28 U.S.C. § 1442(a)(1) (1982) (Historical and Revision Notes).

74. In Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW AND CONTEMP. PROBS. 216 (1948), Professor Wechsler provided a contemporaneous view of the 1948 Revision of section 1442(a)(1) demonstrating that Congress did not eliminate the federal defense requirement. Wechsler criticized the draft Revision for not providing exclusive federal jurisdiction over suits against federal officials "based on a claim of *illegality* in conduct under color of their office." *Id.* at 220 (emphasis added). Wechsler was not referring to all suits arising out of miscellaneous torts committed by officials while on duty, but to suits alleg-

Congress would have greatly expanded federal jurisdiction in contravention of over a century of legislative history and Supreme Court decisions in complete silence, it appears that the extension of protection to all federal employees did not change the character of the protection.[75]

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ing constitutional violations under claim of federal authority. *Id.* at 220, 221 (discussing "parties in the official hierarchy who must be named defendants"). The Supreme Court had recently declined to decide whether such claims alleged a federal cause of action. *Id.* at 222. *See* Bell v. Hood, 327 U.S. 678 (1946).

Professor Wechsler's comments on the draft as it related to such suits indicate that the Revision retained the federal defense requirement. He characterized the removal statute as "a proper *extension* of the removal now allowed to a small number of officials whose cases stand upon no different ground than others." Wechsler, *supra*, at 221 (emphasis added). There is no hint that the character of the protection was changed. He noted that the statute addressed the official's needs by allowing him to "remove in any proper case." Wechsler, *supra*, at 221. If officials may remove prosecutions on account of any act committed while on duty, then Wechsler's comment concerning removal "in any proper case" is inexplicable. The only explanation is that Wechsler assumed that section 1442(a)(1) allowed removal based upon a federal defense, and that officials would be able to establish "the proper case" by asserting the official immunity defense. Wechsler, *supra*, at 221.

Professor Wechsler made his assumption plain when attacking the "well-pleaded" complaint rule. *See* 28 U.S.C. § 1441(a) (1982). "When . . . the plaintiff's reliance is on state law and the defendant claims a federal defense, neither party may remove—except, of course, the special case, to which attention has been called, of actions against federal officials." Wechsler, *supra*, at 233. Federal officials, of course, must assert a federal defense to obtain removal. Wechsler, *supra*, at 234 (proposing that only federal officials should be allowed removal based upon a federal defense).

75. *See* Kelly v. Robinson, 479 U.S. 36, 50 n.11 (1986) (Congress speaks explicitly when it radically re-adjusts the balance between state and federal authority). The Supreme Court has repeatedly held that changes in language made during the 1948 Revision are presumed *not* to have changed the scope and meaning of the statute unless Congress clearly expressed such an intent in the Reviser's Notes. *See* Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222, 226 (1957). *See also* Muniz v. Hoffman, 422 U.S. 454, 467-74 (1975) (collected authority); Walters v. National Assn. of Radiation Survivors, 473 U.S. 305, 318 (1985).

Furthermore, the Court's last decision interpreting section 1442(a)(1) prior to the passage of the amendment supported a narrow construction of the statute. In Screws v. United States, 325 U.S. 91, 111 (1945), the Court was called upon to construe the predecessor statute to 18 U.S.C. § 242 (1982), which criminalized the willful violation of an individual's civil rights. The Court rejected petitioner's argument that an act "under color of law" for purposes of 18 U.S.C. § 242 (1982), included only those acts within the official's authority. The dissent suggested that section 1442(a)(1) only encompassed such acts, and that it should be construed *in pari materia* with 18 U.S.C. § 242 (1982). The majority responded that although section 1442(a)(1) had a particular and narrow meaning which would lead to the result desired by the dissent, the differences in legacy and purpose between the two statutes precluded such a construction of 18 U.S.C. § 242 (1982). *Screws*, 325 U.S. at 111-12, 145-46. *See* Note, *Removal of Suits Against Federal Officers: Does the Malfeasant Mailman Merit a Federal Forum?*, 88 COLUM. L. REV. 1098, 1109-11 (1988).

Congress' inaction since 1948 is interesting in light of its amendment of the Federal Tort Claims Act to provide for removal for federal officials in *civil* suits arising out of their performance of their duties. The Federal Drivers Act, 28 U.S.C. § 2679(d) (1982), provides for removal of civil suits against federal drivers upon certification by the Attorney General that the

III. From Clarity to Confusion: The Apparent Demise of the Federal Defense Requirement

The legislative history is clear: Congress and the Supreme Court consistently required federal officials to allege a federal defense for removal. So how did we get to the point where two circuit courts concluded that the federal defense requirement was extinct? Two independent changes in the law combined to confuse the issue. The first change occurred when the Supreme Court settled a long-standing disagreement over how to treat officials who deny having committed charged acts. The second development was the expansion of the federal official immunity defense.

A. *The Problem of the "Innocent Man"*

To appreciate the problem of how to treat officials who deny having committed the acts charged in the indictment (the "charged acts"), consider a prohibition agent who discovers a homicide victim while raiding an illegal still. The agent reports his discovery to the local authorities and is promptly arrested for murder. The agent has a choice. He has no knowledge of the homicide. If he admits killing the decedent, he falsely incriminates himself. Moreover, since he has no knowledge of the incident, he is not in a position to assert that the killing was required by his duties. An alternative is to deny the killing and claim that he did nothing but his federal duty. But asserting that he did nothing but his duty does not put a federal defense in issue. After all, he is not accused of finding the decedent, but of killing him.

The official would like to plead in the alternative, by denying the killing but alleging that all of his acts at the time of the incident were protected by federal law. The problem with allowing removal upon such an allegation is that the official can obtain removal without definitely stating a federal defense. The case may be removed

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incident occurred while the official was performing his duties.

Three points are worth noting. First, such certification does not provide a defense to the action; it only allows removal. Second, Congress did not add this section until 1961, 13 years after Congress amended section 1442(a), and the legislative history for the Federal Drivers Act makes no mention of section 1442(a). The Act was enacted to provide a convenient vehicle for trial of suits naming both the United States and the federal driver. *See* Katlein, *Administrative Claims and the Substitution of the United States as Defendants Under the Federal Drivers Act: The Catch-22 of the Federal Tort Claims Act?*, 29 Emory L.J. 755, 761-64 (1980). Third, and most important, Congress explicitly limited the Driver's Act to civil suits. Had Congress wished to allow removal of all criminal and civil actions against federal officials for acts in performance of their duties, it would have provided such relief when it enacted that Act.

only to have the official base his entire defense upon the prosecution's burden to prove that he committed the act. There is no guarantee that the federal official really needs the protection of federal law and federal courts.

But prohibiting removal under such circumstances also poses problems. Although many officials know about the act which provoked the prosecution, our official has no knowledge concerning the incident prompting his prosecution. All he knows is that all of his actions were in enforcement of federal law. To force him to elect between a possibly meritorious defense and removal penalizes him for a lack of knowledge about what happened. Consequently, our federal official faces a serious dilemma.

The current split between the Third and Ninth Circuits is the result of this problem and the Supreme Court's efforts to resolve it.

1. *The Lower Courts Grapple with the Issue*

The "innocent man" issue first arose in 1884 in *Illinois v. Fletcher*,[76] where federal marshals seeking to help a colleague avoid arrest by state officials were charged with murder after a gunfight in which one of those state officials was killed. The federal marshals denied having fired their weapons. They also claimed that the incident arose because the state officials had interfered with the marshals' federal authority. The district court denied the petition for removal because the officials had failed to allege that the act for which they were prosecuted (murder) was committed under color of office. Since they had failed to admit the charged act, they had failed to present a federal defense relevant to the prosecution. The court reasoned that the marshals had to meet the charges by justifying their commission of the charged act under federal law.[77] Although that ruling may appear unfair, allowing removal based only upon a denial of the charges would have eliminated the federal defense requirement.

Other federal courts refused to follow *Fletcher*, arguing that a federal official should not be denied removal merely because he denied having committed the charged act. Those courts held that the only issue should be whether the prosecution occurred as a result of the official's enforcement of federal law.[78] But those courts did not

76. 22 F. 776 (N.D. Ill. 1884).

77. *Id.*

78. *See* Oregon v. Wood, 268 F. 975 (D. Or. 1920); Alabama v. Peak, 252 F. 306 (S.D. Ala. 1918).

suggest a standard for ensuring that the official actually had been prosecuted on account of acts protected by federal law or authority. There remained the possibility that the official could gain removal by merely denying the charges and asserting that he had committed only acts protected by federal law. The Supreme Court's attempt to solve the problem in *Soper (No. 1)*[79] was the source of the split among the Circuit courts.

2. *The Supreme Court Addresses the Issue and Opens the Door for Certain Harassment Claims*

In *Soper (No. 1)*, the Court was confronted with the following facts alleged in defendant's removal petition. Several prohibition agents raided an illegal still. The surprised moonshiners fled. After an unsuccessful pursuit, the agents returned to the still to destroy illicit materials. There they discovered a mortally wounded man lying in the path upon which defendants had fled. They brought the man to local authorities. Upon informing the state's attorney of their identity as prohibition officers, they were promptly arrested for murder. They denied knowledge of the murder, but argued that they were entitled to removal because they had found the slain man while on duty.[80]

The Court began with the proposition that removal should be allowed where the prosecution was based upon acts committed by the federal official in enforcement of federal law.[81] However, overruling *Fletcher*,[82] the Court concluded that the official need not admit having committed the charged act. Instead, the official could allege facts sufficient to indicate that the prosecution was motivated by the official's presence performing his duties. The official had to demonstrate the "causal connection" by: (1) detailing all of his actions and showing that each act was in enforcement or execution of federal law; and (2) negating the possibility that he was prosecuted for an act unprotected by federal law.

> There must be a "causal connection" between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of Federal authority and in enforcement of Federal law, and he

79. 270 U.S. 9 (1926).
80. *Id.* at 23-24.
81. *Id.* at 32-33.
82. 22 F. 776 (N.D. Ill. 1884).

> must by direct averment *exclude the possibility* that it was based on acts or conduct of his, *not justified by his Federal duty.* But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under Federal authority. *It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution.* . . .
>
> . . . .
>
> The defense he is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the Federal law, and because he did nothing else on which the prosecution could be based.[83]

By showing that each of his acts was indisputably in enforcement or execution of federal law, the official declared that the prosecution was based either upon: (1) an act protected by a federal defense;[84] or (2) his mere presence at the scene while enforcing federal law.[85]

There is nothing new in allowing removal where the official relies upon a federal defense. However, it is unclear what the Court intended by allowing removal based upon the official's presence on the scene. Examination of this alternative means of removal suggests that *Soper (No. 1)* was unsound and should be repudiated. For the reasons stated below, the Court should adopt the *Fletcher* standard and require the official to admit having committed the charged act.

The Court in *Soper (No. 1)* stated that it allowed removal where the official's "acts or his presence at the place in performance of his official duty constitute the basis, though mistaken *or* false, of the state prosecution."[86] At first reading, it appears that the Court in

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83. *Soper (No. 1)*, 270 U.S. at 33-34 (emphasis added). The Court required an official to waive his fifth amendment rights and be "candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer." *Id.* at 34-35. Such a waiver would not be necessary if an official could obtain removal solely by stating he was on duty, as such a statement could not be inculpatory.

84. The "causal connection" test also applied where the official acknowledged having committed the charged act but alleged a federal defense. In the language quoted above, the Court held that in order to put a federal immunity defense into issue, the official had to negate any inference that the prosecution could properly be based upon an act unprotected by federal law. The Court later relaxed this part of the "causal connection" test for the official immunity defense in civil cases in Willingham v. Morgan, 395 U.S. 402 (1969). *See infra* text accompanying note 118.

85. *Soper (No. 1)*, 270 U.S. 9 (1926) (language quoted in text).

86. *Id.* at 33 (emphasis added).

Soper (No. 1) extended the removal statute to allow removal where an official could show that a State was motivated by animus toward federal authority.[87] However, that phrase also suggests that the Court would allow removal whenever it appears that the State decided to prosecute because it mistakenly (i.e., in good faith) believed that the official's presence performing federal duties was sufficient evidence of guilt. Under this reading, a motive to harass need not be present. Thus, the Court posed the hypothetical of a prosecution commenced

> merely on account of the presence of the officer in discharge of his duties in enforcing the law, at or near the place of the killing, under circumstances casting suspicion of guilt on him. He may not even know who did the killing, and yet his being there and his official activities may have led to the indictment.[88]

The Court stated that "it is enough if the prosecution for murder is based on or arises out of the acts he did under authority of Federal law in the discharge of his duty and only by reason thereof."[89]

The problem is that the "mistake" phrase could be read as allowing removal of cases lacking a federal defense. For example, a defendant in a routine traffic accident could claim that he was prosecuted because of a "mistaken" belief that his performance of a federal duty (i.e., driving) was the cause of the accident. The official's

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87. The Court focused upon the indicia of harassment alleged in the petition. *Id.* at 24 (officials were ordered arrested by the State's Attorney immediately after identifying themselves as prohibition agents).

Before proceeding to discuss other possible meanings of that phrase, it should be noted that the Court appeared to limit the harassment exception by its ruling in Maryland v. Soper (No. 2), 270 U.S. 36, 42 (1926), a companion case to *Soper (No. 1)*. In *Soper (No. 2)*, the officials arrested in *Soper (No. 1)* were brought before an inquest, where they testified concerning the incident. They were then indicted for perjury. The Court denied their petition to remove the perjury prosecution even while appearing to accept their contention that they were indicted because of animus toward federal authority. *Soper (No. 2)*, 270 U.S. at 42-43. The Court found that Congress only intended the removal statute to cover cases where the acts charged by the prosecution, if committed at all, were committed while the official was on duty and as a part of those duties. *Id.* Otherwise, the act motivating prosecution would not have been committed as an "act under color of office." *See* 28 U.S.C. § 1442(a) (1982). The Court denied the petition because the officials had no federal obligation to testify at the inquest, and were therefore not on duty when they allegedly committed the charged act.

This distinction cuts against the theory that Congress intended the removal statute to include harassment. If Congress intended to include harassment as grounds for removal, then any malicious prosecution should be considered a prosecution "for an act under color of office." Otherwise, a state could preclude removal by manufacturing an incident unrelated to the official's duties (e.g., a vagrancy prosecution).

88. *Soper (No. 1)*, 270 U.S. at 33.

89. *Id.*

"presence" at the scene would be the "basis" of the prosecution.[90]

However, the language quoted above makes it clear that the burden is on the official to "exclude the possibility" that the prosecution could be based upon a negligent or intentional act not justified by federal authority.[91] Thus, the official cannot obtain removal simply by stating that he is not guilty.[92] But this still leaves open the possibility that the official may obtain removal upon making a very strong showing that he did nothing wrong, thus "excluding the possibility" that he committed an act unprotected by federal law.

Thus, we are left with a standard somewhere between a right to removal for all acts committed while on duty and a requirement that the official show harassment. Nonetheless, it is possible to derive from the language of *Soper (No. 1)* a tentative standard for removing a "mistaken" prosecution. That standard appears to require a showing of motivation without malice. It seems sufficient to show that the prosecution was motivated by the official: (1) having been on duty; and (2) having been employed to enforce federal law.

Thus, the Court in *Soper (No. 1)* observed that by stating that they had been arrested upon identifying themselves as prohibition officers, defendants had averred "circumstances possibly suggesting the reason and occasion for the criminal charge and the prosecution against them."[93] Although the officials had alleged harassment,[94] the Court may have wanted to construct a remedy for harassment without requiring a federal judge to label it as such. The judge could instead find that the prosecution had "mistakenly" misconstrued the official's enforcement of federal law as evidence of guilt, and allow removal.

While it is clear that the Court in *Soper (No. 1)* failed to provide guidance on the requirements for a showing of "mistake," the Court's larger failing was its basic assumption that officials should be allowed to obtain removal while denying having committed the charged act. That assumption is inconsistent with the intent of Congress in enacting the removal remedy.

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90. The Third Circuit accepted this type of argument in Pennsylvania v. Newcomer, 618 F.2d 246 (3d Cir. 1980). *See infra* text accompanying notes 123-28.

91. *See supra* text accompanying note 83.

92. The Court stated in *Soper (No. 1)* that an official could not obtain removal merely by averring that he was on duty when the charged act occurred. *Soper (No. 1)*, 270 U.S. at 35.

93. *Id.* However, the Court denied removal because the officials had not satisfied the requirement that all of his acts were indisputably in enforcement or execution of federal law; the officials' averments were vague enough to allow an inference that the agents had shot the decedent without cause during the raid. *Id.*

94. *Id.*

Congress intended to allow removal where the official asserted a federal defense requiring construction of federal law.[95] In contrast, the Court sought to allow an official to create an issue of federal law while refusing to assert facts necessary to put that law in issue. According to *Soper (No. 1)*, by eliminating all other bases for a prosecution, the official showed that his prosecution was based upon an activity protected by federal law. Thus, he interposed the federal law protecting that activity as a federal defense.

However, the Court's formulation does not really place a federal defense in issue, as the official's defense at trial will not require construction of federal law. For example, a claim of malicious prosecution will in practice always assert that the official's enforcement activities were protected by federal law, as *Soper (No. 1)* allows the official to allege that those acts were so protected. The official gets to choose which federally protected acts allegedly motivated the prosecution.[96] The only question will be whether the prosecution was motivated by those lawful activities. A similar inquiry will occur where the official claims that the prosecution was motivated by the "mistaken" belief that his enforcement of federal law violated state law.

Furthermore, it makes little difference that the removal proceeding might in some cases turn on what happened, as opposed to the motivation behind the prosecution. To allow removal upon an allegation of "mistake" would create an exception swallowing the federal defense rule. Every official would allege a mistake of fact "motivating" the prosecution. Congress only intended the removal remedy to expedite review of state court rulings concerning the applicability and scope of federal law.[97] Congress did not contemplate

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95. *See supra* text accompanying notes 33-63.

96. Some observers have interpreted *Soper (No. 1)* as merely allowing an official to correct an incorrect recitation of facts in an indictment designed to preclude the official from claiming a federal defense. *See* Alabama v. Peak, 252 F. 306 (S.D. Ala. 1918); Amsterdam, *supra* note 52, at 881 n.363. But this explanation is unconvincing. By alleging that the state has deliberately misstated the facts, the federal official is alleging harassment. The federal official removal statute was intended only to protect against states misinterpreting federal law. As discussed above (*see supra* text accompanying notes 33-63), such a harassment claim is outside the ambit of the statute as envisaged by Congress. Such a claim should be raised by a petition for a writ of habeas corpus.

Requiring the official to admit having committed the charged act does not require him to plead guilty to the offense. *Cf. Peak*, 252 F. 306 (S.D. Ala. 1918). Although the official may admit the *actus reus* of the offense charged, the whole range of *mens rea* defenses (lack of intent, self-defense, etc.) remain available. Requiring the official to incriminate himself to the extent of admitting the *actus reus* is not offensive, given that removal is an extraordinary procedure. Officials requesting a federal forum have to give some indication that federal issues will be raised and resolved. *See Soper (No. 1)*, 270 U.S. at 34 (collected authority).

97. *See supra* text accompanying notes 33-63.

federal officials using the removal process to assert that the prosecution was without factual support.

Thus, *Soper (No. 1)* was wrong when it attempted to allow removal without admission of the charged act. Where the state relies upon the official's legitimate performance of federal duties as a motive for the prosecution, then the official has been harassed. As discussed in a later section, the appropriate remedy for such a violation of the Constitution is not removal, but a writ of habeas corpus.

That having been said, however, the fact remains that the Court in *Soper (No. 1)* stated that removal would be available for those officials who denied having committed the charged act. This error created confusion which ultimately resulted in one circuit eliminating the federal defense requirement.[98] The catalyst for that ruling was the expansion of the federal official immunity defense.

B. *The Federal Official Immunity Defense Changes the Landscape*

The federal official immunity doctrine traditionally shielded legislative and judicial officials for acts performed as part of their official functions.[99] But in 1959, the Court expanded that doctrine to shield all federal officials in civil suits.[100] Federal official immunity relies upon the status of the official in allowing him to commit certain discretionary acts with immunity. Those acts are not in enforcement of federal law, but enjoy protection for policy reasons.

This new defense was different from other "federal defenses" because the official was not required to allege that his acts were committed in furtherance of federal law. Rather, the defense depended only upon the scope of the official's authority to act. The official alleging a "normal" federal defense averred that federal law gave him the *right* to act. The official immunity defense was only concerned with the official's *power* to act.

The official immunity defense was a federal defense because it immunized federal officials from civil suits brought in state courts. The Supremacy Clause gave the official the right to have his immunity defense heard in federal court. Most important for our purposes, officials could easily put this federal defense in issue: the official needed only to aver that he was acting in performance of his official duties.[101]

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98. *See infra* text accompanying notes 123-28.

99. Barr v. Matteo, 360 U.S. 564 (1959).

100. *Id.*

101. It was not until recently that the Supreme Court resolved a split among the circuits

This new federal official immunity defense had unforeseen consequences for removal jurisdiction. Although such a federal defense belonged in federal court, section 1442(a)(1) allowed removal only for acts "under color of office." Did a discretionary act performed while on duty qualify as an act "under color of office?" The Supreme Court in *Soper (No. 1)* had rejected the idea that removal could be obtained solely upon the allegation that the charged act was committed while on duty.[102] However, under the new official immunity doctrine, such an allegation apparently established a federal defense. The Supreme Court addressed this issue in *Willingham v. Morgan*.[103]

Plaintiff inmates in *Willingham* sued their doctor and warden for intentional torts. The doctor and warden petitioned for removal, alleging that all of their contacts with the inmates arose out of their conduct while on duty. The lower court followed *Soper (No. 1)* literally and denied removal because the officials did not negate the inference that they had committed an act unprotected by federal law. Although the lower court was presented with the federal defense of official immunity, it did not recognize that defense as falling within the ambit of section 1442(a)(1). The lower court separated the federal defense of official immunity defense from section 1442(a)(1) by holding that "[t]he test for removal is not the same as the test for immunity for the former is much narrower than the latter."[104]

The Supreme Court faced a dilemma when presented with the lower court's decision in *Willingham*. Removal jurisdiction had to be broad enough to allow the official immunity defense to be litigated in federal court. But general federal question removal jurisdiction[105] could not be invoked because the official immunity defense was not implied in the inmates' complaint. And the Court had already held that the federal official removal statute did not protect officials solely because of their status as officials or because they were on duty when the incident occurred.[106]

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by deciding that the official needed to demonstrate that his act was discretionary. *See* Westfall v. Erwin, 108 S. Ct. 580 (1988).

102. *See* Maryland v. Soper (No. 1), 270 U.S. 9, 35 (1926) (rejecting petition because "these averments amount to hardly more than to say [the charged act] was at a time when they were engaged in performing their official duties").

103. 395 U.S. 402 (1969).

104. Morgan v. Willingham, 383 F.2d 139, 142 (10th Cir. 1967). The court followed other decisions holding that "under color of office" required a defense based upon federal law or authority, and did not encompass all acts performed while on duty. *Id.* (collected authority).

105. 28 U.S.C. § 1441 (1982).

106. "Federal officers and employees are not, merely because they are such, granted

The solution to this dilemma appears simple in hindsight. The history of section 1442(a)(1) indicates that Congress intended to protect the Supremacy Clause by preventing state adjudication of federal law where federal officials were defendants. The official immunity defense is also a federal defense depending upon federal law. The Court should have simply announced that this new defense was within the original, albeit broader, intent of Congress to protect the Supremacy Clause. The Court then could have turned to the question of what showing would be required to put the new defense in issue.[107] The issue of whether removal jurisdiction was "narrower" than the breadth of the official immunity defense would have disappeared.

The Court in *Willingham* arrived at this result but did not take the right path to get there. The Court failed to distinguish between the old and new bases for removal. Instead, it attempted to fit the official immunity defense into the old framework of removal for acts enforcing federal law. By trying to graft the new defense onto an older and different analytical structure, the Court created confusion over the definition of a federal defense and the requirements for putting such defenses in issue.

The Court began by summarizing the history of section 1442(a)(1), characterizing the intent of Congress as preventing interference with *enforcement* of federal law.[108] But the Court never made the leap from an intent to protect acts in furtherance of federal law to an intent to prevent state adjudication of any defense relying upon federal law. Thus, the Court stated that federal jurisdiction rested on "the very basic interest in the *enforcement* of federal law through federal officials."[109] The statute was "at least" broad enough "to cover all cases where federal officers can raise a colorable defense *arising out of their duty to enforce federal law.*"[110] The

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immunity from prosecution in state courts for crimes against state law." Colorado v. Symes, 236 U.S. 510, 518 (1932).

107. *See infra* text accompanying notes 108-16.

108. Thus, the 1815 statute was seen as "part of an attempt to *enforce* an embargo," allowing "federal officials involved in the enforcement of the customs statute to remove." Willingham v. Morgan, 395 U.S. 402, 405 (1969) (emphasis added). The 1863 and 1866 Acts "were eventually codified into a permanent statute which applied mainly to cases growing out of *enforcement* of the revenue laws." *Id.* at 405-06 (emphasis added).

109. *Id.* at 406 (emphasis added).

110. *At the very least*, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. *One* of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts.

Id. at 406-07 (emphasis added).

Court failed to demonstrate that Congress actually intended to protect the new defense, which was based, not upon the official's enforcement of federal law, but upon a policy protecting all acts within the official's authority whether or not those acts were justifiable under federal law.

The Court instead focused upon the absurdity of the lower court's result: a system where removal jurisdiction was not broad enough to encompass cases presenting a valid federal defense. Without any visible support, the Court stated that "Congress certainly meant more than this (the present system) when it chose the words 'under color of . . . office.' "[111] Foregoing the opportunity to clarify this area by finding that Congress intended the statute to include all cases invoking the Supremacy Clause, the Court simply finessed the problem by forbidding "a narrow, grudging interpretation of the statute."[112]

The criticism of this failure could be dismissed as academic nitpicking, except that the Court's decision not to distinguish between the old and new defenses had several practical consequences. After deciding that the official immunity defense was removable upon a proper showing, the Court had to decide just how the defense

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The Court in *Mesa* was careful to redact the italicized words in the passage above when it relied on the same passage as supporting the federal defense requirement. California v. Mesa, 57 U.S.L.W. 4199, 4203 (U.S. Feb. 21, 1989) (No. 87-1206).

The Court in *Willingham* held that all federal defenses were encompassed by the federal official removal statute, including official immunity. The Court also apparently intended to allow officials to obtain removal by "colorably" alleging, as opposed to proving, their federal defense. However, the language quoted above could also be read as preserving an unidentified category of cases where officials could obtain removal without alleging a federal defense.

111. *Willingham*, 395 U.S. at 407. The Court also stated that "in fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." *Id.* Although correct, the Court never stated the source for that statement, nor did it cite to legislative history indicating that Congress contemplated such a defense in 1815 or at the time of subsequent enactments.

112. *Id.* The Court concluded that "[i]n cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." *Id.*

The Court's statement is circular. *Willingham* was not a Tort Claims Act case. Defendants relied on the official immunity defense. *Id.* at 404. The defense of official immunity was not created by Congress—it was a judicial creation. *See* Barr v. Matteo, 360 U.S. 564 (1959). Thus, when the Court stated that Congress had decided that the federal government needed the protection of a federal forum, it had to have been referring to section 1442(a)(1). The statement boils down to an assertion that Congress had intended section 1442(a)(1) to encompass these defenses. But the Court never presented evidence supporting that conclusion, particularly since the official immunity defense was practically non-existent in 1815. Instead of implying that Congress had contemplated protecting a defense based on status, the Court should have found that Congress intended section 1442(a)(1) to effectuate the Supremacy Clause.

could be put in issue. By failing to distinguish between old and new bases for removal, the Court had to use the same rules for determining how the official immunity defense could be alleged.

The old rules assumed that the official had an obligation to establish a "causal connection" between his acts and his enforcement or execution of federal law. But the "causal connection" test was essentially irrelevant for determining whether an official immunity defense had been put in issue. The only requirement for official immunity had been that the official was performing his duties.[113] But the *Willingham* Court attempted to fit the immunity defense into the "causal connection" mold with disastrous results.

The Court noted that *Soper (No. 1)* required an official who did not admit the charged act to detail each of his acts in relation to the suit or prosecution. This presented particular difficulties in *Willingham*, where the warden and prison doctor would have had many contacts with each plaintiff inmate.[114] To require such officials to detail each contact would have required voluminous removal petitions. Accordingly, the Court held that for a civil suit, "it was sufficient for petitioners to have shown their relationship to respondent derived solely from their official duties."[115] This result made sense because the defendants showed that all acts were committed within the scope of employment,[116] and therefore established the defense of official immunity. Had the Court based its holding on that reasoning, no harm would have resulted.

Unfortunately, the Court found it necessary to employ the "causal connection" test out of context. Worse, it used only a portion of the test. The Court explained:

> Past cases have interpreted the 'color of office' test to require a

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113. When *Willingham* was decided, it was at least unclear that the official immunity defense covered only discretionary acts. It was assumed in *Willingham* that the warden and the doctor had the discretion to impose medical treatment. However, the Court's decision in Westfall v. Erwin, 108 S. Ct. 580 (1988), complicates matters. If the official immunity defense now only protects discretionary acts, does each official sued civilly have to assert that each of his acts with respect to plaintiff(s) was discretionary in order to obtain removal? This question remains to be resolved. If the official must show that his acts were discretionary, the official might have to present evidence at the evidentiary hearing demonstrating the discretionary nature of his contacts with plaintiff. Merely alleging that he was on duty at all times may no longer suffice.

Given that the discretionary nature of the act is now one of the elements of the official immunity, it seems fair to require the official to make a "colorable" showing that his acts were in fact discretionary.

114. 395 U.S. at 408-09.

115. *Id.* at 409.

116. *Id.*

> showing of a 'causal connection' between the charged conduct and asserted official authority. *Maryland v. Soper (No. 1)*, *supra*, at 33. 'It is enough that [petitioners'] acts or [their] presence at the place in *performance of [their] official duty* constitute the basis, though mistaken or false, of the state prosecution.' In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required 'causal connection'. The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times.[117]

The Court in *Willingham* gave the "presence" language a double meaning. The language originally was part of the discussion about how officials could establish a federal defense where they lacked knowledge of the incident, but averred that all of their acts were in enforcement or execution of federal law. The Court in *Soper (No. 1)* used "performance of official duty" to mean enforcement of federal law. The Court in *Willingham* used "performance of official duty" to mean "committing an act while on duty," without any connection to the enforcement or execution of federal law. In addition, the Court did not state that its reasoning applied only to the official immunity defense, thereby suggesting that it had redefined the test for putting all federal defenses in issue.

Moreover, the problem could not be confined to the question of how a defense is put into issue since that question defines the standard for removal. If all federal defenses can be placed into issue by showing that the official was on duty, then any case can be removed upon that allegation. Once the case is removed, there is no requirement that the federal official rely upon a particular defense; he may require the plaintiff or prosecution to prove its case and overcome any defense as in any other trial. Thus, *Willingham* could be read as having abolished the federal defense requirement.

The Court's discussion of the "causal connection" test was largely confined to civil cases. The Court relaxed the *Soper (No. 1)* "causal connection" test for civil cases while still retaining the federal defense requirement. *Soper (No. 1)* required all officials, even those who admitted having committed the act and justified that act as executing or enforcing federal law, to negate any inference that the prosecution could properly be based upon an act unprotected by fed-

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117. *Id.* (quoting Maryland v. Soper (No. 1), 270 U.S. 9 (1926)) (bracketed material appears in *Willingham*) (emphasis added).

eral law.[118] But such a test posed administrative difficulties in civil cases such as *Willingham*. The need for a high standard was also less important because the official immunity defense was so easily established. Thus, the Court lowered the showing needed in civil cases by requiring only a "colorable" showing of a federal defense.

But, in a footnote, the court briefly addressed the appropriate standard for criminal cases. It noted:

> Were this a criminal case, a more detailed showing *might* be necessary because of the more compelling state interest in conducting criminal trials in the state courts. *Cf. Colorado v. Symes, supra; Maryland v. Soper (No. 1), supra.*[119]

Unfortunately, this comment did not make the Court's view sufficiently clear. The Court did not explain what it meant by "a more detailed showing." The footnote appeared to group official immunity, available only in civil cases, with all other federal defenses. That grouping suggested that the "more detailed showing" would apply to all defenses without differentiation. This in turn suggested that an official could still remove a criminal prosecution by averring that he was on duty without alleging a federal defense, so long as he made "a more detailed" showing concerning his activities.

Thus, a postal official charged with vehicular manslaughter could allege that he was driving a postal vehicle when the accident occurred. Although this would suffice in a civil case, the footnote suggests that more is required in a criminal case. However, since *Willingham* can be read as holding that the official would not have to prove that he was innocent in order to remove his case, the footnote would not seem to require the official to show that he was not negligent or that his acts were justified by federal law. The stricter showing might only require the official to negate the possibility that he was somehow not performing his duty (i.e. that he was intoxi-

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118. *See supra* text accompanying note 83. Requiring the federal official to negate the inference that he committed a crime makes removal very difficult. The Court's application of this standard in Colorado v. Symes, 286 U.S. 510 (1932), indicates that the petition alone, no matter how complete, cannot satisfy the heavy burden of demonstrating that the official did not commit the crime. Defendant prohibition officer was arrested for murder after he struck a bar patron with his gun when the patron resisted arrest. Although the officer stated that: (1) he seized a bottle of wine from the suspect as evidence and arrested the suspect; (2) the suspect attempted to destroy the bottle; (3) the suspect attempted to assault the officer and that a scuffle ensued; and (4) the officer struck the suspect with his gun in order to subdue him and prevent him from destroying evidence, the Court found the petition "so vague, indefinite and uncertain as not to commit petitioner in respect of essential details of the defense he claims." *Id.* at 516, 521.

119. Willingham v. Morgan. 395 U.S. 402, 409 n.4 (1969) (emphasis added).

cated or on his lunch break).[120] The foolishness of this example suggests that the footnote might mean something more profound.[121] But the Court's failure to explain itself meant that later courts would either ignore or misinterpret the footnote.[122]

C. *The Lower Courts Abolish the Federal Defense Requirement*

The potential for misinterpretation of *Willingham* was realized in 1980 when the Third Circuit proclaimed the federal defense requirement extinct. In *Pennsylvania v. Newcomer*,[123] a mail carrier struck and killed a pedestrian while driving a mail route. The official petitioned for removal on the ground that he was on duty when the accident occurred.

The Third Circuit relied upon two arguments in dismantling the federal defense requirement. First, the court incorrectly stated that the original removal statutes "were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of federal government by the state."[124] The Supreme Court in *Willingham* did not suggest that

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120. Or, on a more serious note, that his acts in driving the vehicle were clearly connected with his official duty. *See* Virginia v. Harvey, 571 F. Supp. 464 (E.D. Va. 1983). Although the district court interpreted *Willingham* to require a federal defense in criminal cases, it did so by holding that footnote 4 required it to ignore the "causal connection" test and by reading a federal defense requirement into Justice Black's concurring opinion.

This author does not follow the district court's interpretation of Justice Black's concurring opinion. Justice Black believed the majority's comparison between the breadth of the right to remove with the right to official immunity unnecessary. This is puzzling because that comparison provides the basis for the Court's conclusion that Congress intended the federal official removal statute to encompass federal immunity cases. Perhaps Justice Black intended to rest his decision on the requirement that all federal defenses be removable as an incident of federal supremacy. This would justify reading the federal defense requirement into his opinion. However, this author cannot read such a major divergence from the majority's reasoning into such a cryptic concurring opinion.

121. The Court did not decide whether to relax the test for putting a federal defense in issue for criminal cases. It appears that some relaxation of the standard is needed because it is so difficult to negate any possible inference of wrongdoing. *See supra* note 118. Given the need to ensure that federal law is adjudicated by federal courts, the official should be required to demonstrate a "colorable" (i.e., plausible) defense at the evidentiary hearing. Indeed, the Court in *Mesa* appeared to assume that the "colorable" standard governs in criminal cases. California v. Mesa, 57 U.S.L.W. 4199 (U.S. Feb. 21, 1989) (No. 87-1206).

122. *See infra* text accompanying notes 123-32.

123. 618 F.2d 246 (3d Cir. 1980).

124. *Id.* at 250 (citing Tennessee v. Davis, 100 U.S. 257 (1880)). As discussed earlier, *Davis* does not support that proposition. *See supra* text accompanying notes 61-63.

The court also cited Amsterdam, *supra* note 52. This excellent article touches on section 1442 in its discussion of the civil rights removal statute (28 U.S.C. § 1443 (1982)). Professor Amsterdam did not support the Third Circuit's interpretation of congressional intent, although he noted that Congress intended to protect both federal law and federal officials. *See* Amster-

view of legislative intent and the Third Circuit presented no legislative history supporting it.

Indeed, the Third Circuit's second argument contradicted its first by implying that the elimination of the federal defense requirement was not required by an analysis of congressional intent, but was compelled by *Willingham*. The Circuit stated that although the official did not allege a defense based upon enforcement of federal law, "the liberal construction to be afforded the statute . . . and the interpretation of 'color of office' supplied by *Willingham* compel our result in this case."[125] Specifically, the court relied upon the maxim from *Willingham* and *Soper (No. 1)* that the official need not admit that he committed the charged acts. But at this point, the Court diverged from the *Soper (No. 1)* analysis.

> As the Court noted in *Soper*, removal would be available to an officer who denied any relationship to the charged offense. *In such a case, of course, the denial does not involve a federal defense.* We therefore believe that the appropriate standard is not the presence of a federal defense, but rather, as applied in Willingham v. Morgan, the causal connection between the charged conduct and federal authority, a connection which we believe exists in this case.[126]

Of course, *Soper (No. 1)* indicates that the denial must be accompanied by sufficient facts to allege a connection between the prosecution and enforcement of federal law. The official raises the fed-

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dam, *supra* note 52, at 807-08 n.70. The court failed to cite Amsterdam's remark that a defendant seeking removal under section 1442(a)(1) must show colorable protection under federal law. Amsterdam, *supra* note 52, at 874 n.328 (citing *Davis*, 100 U.S. 257 (1880)).

125. *Newcomer*, 618 F.2d at 250. But the "liberal construction" of section 1442(a)(1) was intended only to require district courts to allow removal to all officials presenting a federal defense. The genesis of the "liberal construction" requirement was Colorado v. Symes, 286 U.S. 510 (1932).

> The various acts of Congress constituting the section as it now stands *were enacted to maintain the supremacy of the laws of the United States* by safeguarding officers and other *acting under federal authority* against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power. [Citations omitted]. It scarcely need be said that such measures are to be *liberally* construed to give full effect *to the purposes for which they were enacted.*

Id. at 517 (emphasis added). Although this "liberal" construction was limited in *Symes* to cases presenting a federal defense, that limitation was omitted by the Court in *Willingham* without explanation. The Court in *Willingham*, citing *Symes*, stated only that the statute should be construed liberally. Willingham v. Morgan, 395 U.S. 402 (1969). However, the Court was deciding that the statute had to be construed liberally in order to encompass a previously unrecognized federal defense.

126. *Newcomer*, 618 F.2d at 250 (emphasis added).

eral defense as part of his denial.

But the Third Circuit relied upon the *Soper (No. 1)* "causal connection" language as interpreted by *Willingham*. In *Willingham*, the federal official could obtain removal by denying the act without alleging enforcement of federal law. Such a denial, accompanied by an allegation that the official was on duty, presented a federal defense for that civil case. Such a denial in the criminal case did not present a federal defense. But because *Willingham* failed to distinguish between defenses based upon enforcement of federal law and defenses based upon performance of duty, the Third Circuit took the standard employed in *Willingham* as applying to all cases.[127]

The Third Circuit applied the "causal connection" test to the petition in *Newcomer*, and held that the mail carrier satisfied the test by alleging that he was on duty.[128] The Third Circuit would not have abolished the federal defense requirement had it read *Soper (No. 1)* in context. Although the *Willingham* footnote cautioned against applying its version of the "causal connection" test to criminal cases, the Third Circuit ignored its warning.

The Sixth Circuit soon announced that a federal defense was no longer required after *Newcomer*. In *Stein-Sapir v. Birdsell*,[129] a federal parks official was sued civilly for libel based upon a press interview. He sought removal under section 1442(a)(1) and apparently relied upon the official immunity doctrine.[130] The Sixth Circuit properly followed *Willingham* in allowing removal, but nevertheless

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127. The color of office test has repeatedly been interpreted to require a 'causal connection' between the charged conduct and asserted official authority. [quoting *Soper (No. 1)* and *Willingham*] It is enough that petitioner's acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution. [quoting *Soper (No. 1)* and *Willingham*]. So, for example, in *Willingham* . . . the prison warden was held to have satisfied this causal connection merely by the fact that he was on duty, at his place of employment, at all relevant times. [citing *Willingham*]. Similarly, we believe that the defendant has satisfactorily demonstrated . . . the necessary causal connection in this case between his federal authority to drive a postal truck and the acts involved in the accident which are the basis of the instant prosecution, acts which occurred while he was acting as an employee of the postal service, while driving a postal truck, within the scope of his office.

Id. at 249-50.

The court distinguished earlier cases by stating that they were decided before *Willingham*. *Id.* at 250.

128. *See supra* note 127.

129. 673 F.2d 165 (6th Cir. 1982).

130. *See* Barr v. Matteo, 360 U.S. 564 (1959). The issue was never reached because defendant prevailed on a defense based upon Ohio law under which the death of a party abates the action. *Stein-Sapir*, 673 F.2d at 167.

contributed to the confusion. Plaintiff had cited several cases denying removal which pre-dated the expansion of the official immunity doctrine.[131] Instead of distinguishing those cases by noting that defendant in the instant case possessed the federal defense of official immunity, the court inexplicably cited *Newcomer* and noted that "[s]ince *Morgan*, at least one circuit has held allegations of a federal defense are not essential for removal."[132]

D. *The Ninth Circuit Restores Order Without Resolving the Confusion*

The validity of the federal defense requirement was revisited but unsatisfactorily resolved in 1987 by the Ninth Circuit in *California v. Mesa*.[133] Although the Ninth Circuit wisely declined to follow *Newcomer*, it still failed to provide a convincing interpretation of congressional intent. The Circuit characterized section 1442(a) as a "balance between state sovereignty and federal interests,"[134] but stopped short of holding that Congress intended to require a federal defense for removal in all cases. The Circuit ultimately relied upon *Soper (No. 1)* and *Willingham* in holding that a federal defense was required to remove criminal prosecutions against postal workers.[135] The Circuit declined to follow *Newcomer* because it believed that the *Willingham* footnote distinguishing civil and criminal cases meant that "*Willingham*'s broad reading of 'under color of office' cannot be casually imported into the criminal arena."[136] Thus, it concluded that something more was required for removal in criminal cases.

However, once the Circuit decided to rely upon the *Willingham* footnote, it had to address the issue left untouched by the Supreme Court in that case: what constitutes the "more detailed showing" required to remove criminal cases?

The Circuit could have held that this showing always requires

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131. *Id.* at 166 (citing People v. Banning, 88 F. Supp. 449 (E.D. Mich. 1950); Ampey v. Thornton, 65 F. Supp. 216 (D.C. Minn. 1946)).

132. *Id.* at 166-67. *See also* People of Puerto Rico v. Santos-Marrerro, 624 F. Supp. 308 (D.P.R. 1985). The court offered no independent analysis of the issue presented in this article. *But see* Virginia v. Harvey, 571 F. Supp. 464 (E.D. Va. 1983), which reached a contrary conclusion without even mentioning *Newcomer*.

133. 813 F.2d 960 (9th Cir. 1987).

134. *Id.* at 964.

135. *Id.* at 964-67. Although the Circuit suggested that Congress always "balanced the perceived federal interests of the time against the states' traditional right to enforce their criminal laws in their own courts," it did not suggest that Congress intended to require a federal defense in all cases. *Id.* at 964.

136. *Id.* at 966.

a federal defense per *Soper (No. 1)*.[137] Instead, the Ninth Circuit's decision referred only to postal workers.[138] A careful reading of that decision suggests that the reference to postal workers alone reflected more than judicial reluctance to pass on questions not yet presented. The Ninth Circuit apparently decided that the "more detailed showing" required by *Willingham* should be defined by balancing the federal and state interests in each case. The federal interest in removing routine traffic infractions did not overcome the state's interest in maintaining traffic safety.[139] However, the Circuit was careful to suggest that different facts might compel a different result, hinting that concern over state animus toward federal substantive law or a particular class of federal employees might tip the balance.[140]

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137. 270 U.S. 9 (1926). Although this author believes it to be an incorrect reading of *Willingham*, assume for the moment that footnote 4 refers to the issue of whether a federal defense is required for a particular case. There appear to be two ways to interpret that footnote. First, the note could be read as an expression of uncertainty. The Court could have meant that *if* a different standard is required for criminal cases ("a detailed showing *might* be necessary"), then the standard will be higher. Thus, the Ninth Circuit could have held: (1) such a standard is required for a criminal case; and (2) that standard is the *Soper (No. 1)* standard.

Or, that note could be seen as allowing a case-by-case determination of whether the federal interest presented in each case is so strong as to overcome the state's interest in its own sovereignty. The Ninth Circuit apparently pursued the latter course.

138. "Because of the states' compelling interest in the administration of their criminal justice systems, we hold that federal *postal* workers may not remove state criminal prosecutions to federal court when they raise no colorable claim of federal immunity or other federal defense." *Mesa*, 813 F.2d at 967 (emphasis added).

139. Congress could not have intended 28 U.S.C. § 1442(a)(1) to turn the federal courts into a special traffic court for federal employees. Whatever remote federal interests are implicated by state traffic regulation of postal vehicles, the overcrowded district courts do not need a new category of pesky cases turning solely on state law. The cost and inconvenience to the state of enforcing petty traffic infractions (only to receive nominal fines) and driving misdemeanors in federal court may lead them to curtail, or even forgo, prosecution of these offenses when committed by federal postal workers. We do not believe that Congress intended the federal officer removal statute to infringe so drastically upon the states' ability to keep their neighborhood streets safe.

Id. at 967.

Although at first glance this might appear to be an interpretation of congressional intent, the court only mentioned legislative history in connection with its decision that Congress intended to balance state sovereignty and federal interests. *Id.* at 964. The Circuit appears to have balanced the particular interests in the case before it, holding that the federal interests presented were of too little weight to change the usual requirement of a federal defense mandated in criminal cases according to *Soper (No. 1)*. *See, e.g.*, Note, *Removal of Suits Against Federal Officers: Does the Malfeasant Mailman Merit A Federal Forum*, 88 COLUM. L. REV. 1098 n.66 (suggesting that the federal interest in removing civil suits is stronger because of the risk to the federal fisc).

140. The best evidence that the Circuit adopted a balancing test is that it expressly confined its holding to postal employees. *See Mesa*, 813 F.2d at 967. There was no reason to

Although the Ninth Circuit solved one of the problems created by *Newcomer* by eliminating removal of routine offenses committed while on duty, it created another. The problem resulted from the Ninth Circuit's failure to determine legislative intent. The distinction between civil and criminal prosecutions is based upon reluctance to override the strong state interest in sovereignty over enforcement of its laws.[141] The federal interest in removal is subordinate in some cases to this stronger interest, at least to the extent of requiring a greater "showing" for removal.[142] It follows that there may be cases where the federal interest is so compelling as to abolish the federal defense requirement even in criminal cases.[143] The Ninth Circuit suggested that such determinations should be made, at least in some

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confine the holding to postal workers; a ruling based upon *Soper (No. 1)* should have encompassed all federal employees (with the exception of court officers, who are covered under section 1442(a)(3)). The Circuit declined to issue such a sweeping ruling because of its concern that other employees might present stronger federal interests, particularly those employees more likely to encounter state hostility. The Circuit indicated its view of the balance in that instant case.

> Although a fear of state court prejudice certainly played a role in the evolution of § 1442(a)(1), the Supreme Court has never indicated that this interest *alone* would justify removal of a state criminal prosecution. Moreover, *this federal interest would be more compelling* in the context of civil rights law or some realm of federal authority likely to encounter antagonism in state court. *There is simply no reason to believe that, on a systematic basis, postal workers will not get a fair shake in state court.*

Id. at 966-67 (citations omitted) (emphasis added).

The Circuit's opinion suggests that a showing of past clashes between state authority and a particular class of federal officials would affect the balance. Note that this is different from allegations by individual officials that their prosecutions were motivated by animus. The Circuit made a judgment in advance that certain officials are unlikely to encounter animus. That judgment could be different for other groups of officials (e.g., IRS, OSHA, or EPA officials), suggesting that such officials might not have to allege a federal defense. For example, the Ninth Circuit's opinion might be read as justifying removal of all prosecutions against federal civilians engaged in national security projects.

It is not entirely clear that the Circuit intended to employ a balancing approach. However, the limitation of its holding to a single group of officials, combined with its finding of an absence of state animus toward those federal officials, suggests that at the very least the Circuit did not wish to commit future courts to rigidly applying the federal defense requirement. The problem is that if *Soper (No. 1)* is not always the standard, what is the standard and how is it derived?

141. Willingham v. Morgan, 395 U.S. 402, 409 n.4 (1969). The court in *Mesa* characterized the state's interest in maintaining its ability to enforce its criminal laws as "the centermost pillar of sovereignty." *Mesa*, 813 F.2d at 966.

142. *Willingham*, 395 U.S. at 409 n.4.

143. In *Willingham*, the distinction between civil and criminal cases extended only to the showing required to put the federal defense in issue. *See supra* text accompanying notes 114-21. The Ninth Circuit suggested that the federal defense requirement itself depended upon whether the case was civil or criminal.

instances, on a case-by-case basis.[144] But there were no guidelines available for evaluating that federal interest. There should be more certainty when determining the existence of federal jurisdiction.[145]

More importantly, this test ignored the intent of Congress. Congress created section 1442(a) as a way of balancing federal and state interests. Congress established the federal defense requirement to ensure a balance between those interests. Recasting or "refining" that balance must be left to Congress.

E. *The Supreme Court Reaffirms the Federal Defense Requirement But Fails to Solve the Harassment Problem*

The Supreme Court in *Mesa* played safe by relying on its own precedents in affirming the Ninth Circuit's decision and reaffirming the validity of the federal defense requirement.[146] The Court saw no need to reach other issues because the federal officials in the cases had not alleged harassment.[147] The Court found that the early cases such as *The Mayor v. Cooper*[148] and *Tennessee v. Davis*[149] made clear the Court's fidelity to the federal defense requirement.[150] The Court correctly found that its later cases, while less clear on the subject, nonetheless demonstrated that the Court had always assumed the validity of the federal defense requirement.[151] Unfortunately, the Court did little to clarify the original intent of Congress.[152]

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144. At least one other court has denied removal because "the federal government's interest in having petitioner tried in this court is so remote, compared to the state's interest in safeguarding the public from dangerous drivers." Georgia v. Waller, 660 F. Supp. 952, 954 (M.D. Ga. 1987). Although applying the Ninth Circuit's analysis, that opinion was not cited, possibly because it had not yet been published in the official reports.

145. A balancing test would be entirely subjective, leaving federal judges too much discretion in deciding what cases should be removed. Their evaluations of federal interests can be unpredictable. In *Mesa*, the district court judge stated that he believed removal was proper because of the paramount federal interest in mail delivery. Reporter's Transcript of Hearing on the People of the State of California's Opposition to Petition for Removal and Motion for Remand at 5-6, 8:21-25, *Mesa*, 813 F.2d 960, 966 (9th Cir. 1987). Federal jurisdiction should not vary from one judge to another. Inconsistency would be the hallmark of such a system, and states would have legitimate fears that federal interests would receive undue deference by federal judges. Finally, each case would present a different balance of interests and could require a time-consuming hearing in district court.

146. 57 U.S.L.W. 4199 (U.S. Feb. 21, 1989) (No. 87-1206).

147. *Id.* at 4204.

148. 73 U.S. (6 Wall.) 247 (1867); *see supra* text accompanying note 53.

149. 100 U.S. 257 (1880); *see supra* text accompanying note 61.

150. *Mesa*, 57 U.S.L.W. at 4201.

151. *Id.* at 4201-03.

152. The Court relied almost entirely upon its precedents. The only interpretation of legislative history concerned the 1916 Act. *Id.* at 4203; *see supra* text accompanying notes 64-71. The Court ruled that the 1916 Act did not eliminate the federal defense requirement

However, the Court was aware of the harassment problem. The Court distinguished *Soper (No. 1)* as "a unique criminal prosecution, markedly unlike those before us today, where a federal officer pleaded by traverse and sought removal."[153] Although the Court specifically declined to pass on the validity of *Soper (No. 1)*,[154] the concurring opinion by Justices Brennan and Marshall[155] appears to endorse that decision as a remedy for harassment.[156] Emphasizing that "the days of widespread resistance by state and local governmental authorities to acts of Congress and to decisions of this Court in the areas of school desegregation and voting rights are not so distant,"[157] Justice Brennan suggested that Congress might have intended section 1442(a)(1) to encompass harassment claims.[158] Justice Brennan stated that the Court had not foreclosed the possibility that the *Soper (No. 1)* "causal connection" test[159] would allow removal of harassment claims.[160]

Thus, the Court's decision leaves the harassment issue unresolved. In addition, the federal government may seek to protect its officials against any possibility of harassment by requesting Congress to amend the statute to: (1) abrogate the federal defense requirement; or (2) retain the requirement, but allow harassment as a grounds for removal.

The second potential amendment will be addressed in the section discussing habeas corpus.[161] The first amendment merits discussion because the Court in *Mesa* missed an opportunity to insulate the federal defense requirement from amendment and clearly define the limits of article III jurisdiction.[162] The next section sets forth the argument that the federal defense requirement is not just a creation of Congress that can be eliminated by amendment, but an immutable boundary defined by and coextensive with the federal jurisdiction

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recognized in the Court's earlier decisions. *Id.* The Court did not discuss the Acts of 1815, 1833, or 1863 at all. *Id.*

153. *Id.* at 4202.

154. *Id.*

155. *Id.* at 4202-05 (Brennan, J., concurring).

156. *Id.*

157. *Id.* at 4205.

158. *Id.*

159. *See supra* text accompanying notes 76-98.

160. *Mesa*, 57 U.S.L.W. at 4205 (Brennan, J., concurring).

161. *See infra* text accompanying notes 222-32.

162. Although the court stated that the absence of a federal defense posed "grave constitutional problems" (*Mesa*, 57 U.S.L.W. at 4204), it did not resolve those problems. Rather, it acted prudently in relying upon the gravity of the constitutional problem as justifying a construction of section 1442(a)(1) requiring a federal defense. *Id.*

provided by article III.

IV. ARTICLE III JURISDICTION DOES NOT ENCOMPASS FEDERAL OFFICIALS ACTING IN THEIR PRIVATE CAPACITIES

Article III jurisdiction extends only to cases "arising under" the laws or Constitution of the United States.[163] On its face, article III does not allow removal of cases lacking a federal defense because the official cannot present an issue of federal law.[164] The federal defense requirement is critical because it alone supplies the federal issue necessary for jurisdiction.[165] Although article III has always been interpreted broadly to allow federal enforcement of the Supremacy Clause, the federal defense requirement is coextensive with the Clause. There is no clash between state and federal authority where the federal official presents no federal defense. Thus, section 1442(a), properly construed, is a boundary line for article III jurisdiction.

However, the boundaries of article III jurisdiction have been hotly contested and the dissenting judge at the Ninth Circuit in *Mesa* stated that he would have found federal jurisdiction on two grounds.[166] First, he reasoned that the case "arose under" article III because the official was employed to perform duties that were authorized by federal law.[167] Second, he suggested that even if the case

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163. U.S. CONST. art. III, § 2.

164. It should be noted that article III would encompass cases where the official asserts a claim of harassment as a defense, and that such cases are not discussed in this section. An amendment adding harassment as a grounds for removal would satisfy article III because such cases arise under the Supremacy Clause. Such an amendment is addressed in the section of this article discussing habeas corpus. *See infra* text accompanying notes 222-32.

165. *See, e.g.*, Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) ("[R]emoval is possible in a nondiversity case such as this one only because the interpretation of a federal defense makes the case one 'arising under' the Constitution or laws of the United States."). Thus, the Supreme Court held that suits involving federal receivers do not arise under the laws or Constitution of the United States where there is no reliance upon federal court orders or laws. *See* Gay v. Ruff, 292 U.S. 25 (1934), and cases cited therein. Although the Court in both *Wheeldin* and *Ruff* was referring to the general federal question statute, which is currently construed more narrowly than article III (*see* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983)), these cases still suggest that a federal defense is necessary for federal jurisdiction.

166. A case based on the act of a federal employee acting within the scope of his employment arises under the Constitution, which creates the authority to authorize his work, and under the laws of the United States that do authorize it, that make him a federal employee within a federal program with a federal function.

Mesa, 813 F.2d at 968 (J. Noonan, dissenting) (citing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)).

167. *Id.* Section 1442(a) cannot itself confer federal jurisdiction because statutes which do no more than "confer a new jurisdiction on the district courts" cannot enlarge the boundaries of article III. *Verlinden B.V.*, 461 U.S. at 496 (quoting The Propeller Genesee Chief v.

does not directly arise under the Constitution or federal law, the United States has the power to provide jurisdiction for all cases involving its "agents and instrumentalities."[168]

To address the first argument we must examine the most expansive interpretation of "arising under" jurisdiction by the Supreme Court to date: *Osborn v. Bank of the United States*.[169] The second argument relies on the modern theory of "protective jurisdiction" and will be addressed subsequently.

A. *Osborn v. Bank of the United States*

The quintessential formulation of the breadth of article III jurisdiction was set forth in *Osborn v. Bank of the United States*. The Court stated that jurisdiction exists where "the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."[170] Under that test, removal without a federal defense would be unconstitutional because by definition the rights of the federal official would not depend upon a construction of the Constitution or federal law.

But *Osborn* has also been read as holding that jurisdiction exists whenever the case presents a *potential* federal issue.[171] However, a thorough reading of *Osborn* suggests that the word "potential" includes only those issues which are necessarily presented by plaintiff's complaint.

Osborn involved a suit by the Bank of the United States against state officials for invading the Bank and misappropriating money from its vaults for unpaid taxes.[172] The case clearly raised federal issues, including the validity of the underlying taxes.[173] However, the Court addressed the larger issue of whether the Bank could al-

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Fitzhugh, 53 U.S. (12 How.) 443, 451-53 (1852)).

168. *Mesa*, 813 F.2d at 968.

169. 22 U.S. (9 Wheat.) 738 (1824).

170. *Id.* at 822.

171. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481-82 (1957) (Frankfurter, J., dissenting) (criticizing *Osborn*). *Osborn* has been criticized in this decade. *See* Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 965-72 (1982) [hereinafter *Protective Jurisdiction*]. The Supreme Court noted the potential breadth of *Osborn* while avoiding a potential article III issue in *Verlinden B.V.*, 461 U.S. at 492-93. *See infra* note 197. *See also* Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 746 n.157 (noting different interpretations of *Osborn*).

172. The tax and its collection were illegal per McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). For a history of the case, see *Protective Jurisdiction*, *supra* note 171, at 966-67.

173. *Osborn*, 22 U.S. (9 Wheat.) 738 (1824).

ways sue in federal court by virtue of a provision of its federal charter allowing it to sue and be sued in federal court, even where no federal issues were explicitly raised in a particular case.[174]

The Court focused upon the peculiar nature of the Bank as an instrumentality of the United States. Because it was a creature of federal law, the validity of its acts depended upon the authority of the Bank to act under its federal charter. An adverse party potentially could raise a federal issue by challenging the authority of the Bank to sue; subsequent interpretation of the federal charter would pose the federal issue. The Court stated that the case arose under federal law because the federal authority issue "forms an original ingredient in every cause."[175]

This "original ingredient" theory must be carefully defined. There are two types of cases which must be kept separate. First, there are cases where the character of the action always presents federal issues. *Osborn* was an example of the type of case that always presents federal issues. These issues are "potential" because they may or may not be "raised" by one or both of the parties in the action. Indeed, such issues may be so well-settled that it is highly unlikely that they will be "raised" by the parties (e.g., the Bank's

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174. *Id.* Perhaps as interesting for our purposes as the opinion itself is the brief presented by the losing side. In response to the argument that all cases brought by the Bank arise under federal law solely because the Bank was created by Congress, attorneys for the state officials pointed out the limits of that argument.

> A clear distinction exists between a party and a cause; the party may originate under a law with which the cause has no connection. A revenue officer may commit a trespass while executing his official duties, and *if he justifies under the statutes of the United States, a question will arise under them*, in which an appellate jurisdiction is given to this court, to correct the errors of the state courts. But could Congress give additional jurisdiction to the federal courts, in all suits brought by or against revenue officers?

Id. at 814 (emphasis added).

This is the only published commentary to be found on the 1815 Act, and it clearly indicates that at least the authors of the briefs believed that Congress had only provided for removal where the officer could justify his conduct (i.e., present a federal defense) under the revenue laws.

The briefs for the Bank of the United States are also interesting because they clearly state that federal officials may operate in a private capacity.

> Suppose an officer created by act of Congress, could not Congress confer on him the privileges of suing and being sued, in the courts of the Union? Such an officer has two capacities, private and official, and may be subject to different jurisdictions, according as either is affected. But a corporation has but one capacity, and its faculties cannot be divided.

Id. at 807.

The two briefs considered together suggest that the parties never considered that Congress could confer jurisdiction arising out of the official's private capacity.

175. *Id.* at 820.

right to sue or contract). However, these issues are present at the outset of the case because it is apparent from the facts presented in the complaint that the rights of the parties are dependent upon the resolution of a federal issue. If the Bank cannot sue, then the defendant prevails. The "original ingredient" test confers jurisdiction in such cases.[176]

The status of the party is only important if it by itself ensures the existence of federal issues in every case. *Osborn* was a rare case

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176. This holding was the point of contention between the majority and dissent in *Osborn*. Justice Johnson, in dissent, stated that a federal issue did not "arise" for purposes of article III until a party "raised" the issue. *Id.* at 888-89. Justice Marshall decided that issues necessarily implied by the complaint, though well-settled and not raised by either party, presented federal issues sufficient for jurisdiction. *Id.* at 824-25.

Most important, neither Marshall nor Johnson argued that issues which were not necessarily implied by plaintiff's complaint, but could conceivably appear later in the action depending upon facts later presented, could serve as the foundation for article III jurisdiction. Thus Marshall wrote:

> The act itself is the first ingredient in the case—is its origin—is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

Id. at 823. *See* Shoshone Mining Co. v. Rutter, 177 U.S. 505, 509-10 (1900) (interpreting *Osborn*).

The Court in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), missed this distinction in its remarks in dicta concerning *Osborn*. Justice Marshall, as part of his holding in *Osborn* that the presence of one federal question allows jurisdiction over all questions presented in the case, stated the following:

> If it be a sufficient foundation for jurisdiction, that the title or right set up by the party *may* defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, *provided the facts necessary to support the action, be made out*, then all the other questions must be decided as incidental to this, which gives that jurisdiction.

Osborn, 22 U.S. (9 Wheat.) at 822 (emphasis added). The Court in *Verlinden* interpreted "may" as indicating that Marshall found article III jurisdiction whenever there was a *possibility* that a federal question would be presented during the action. But Marshall in this section of the opinion was not attempting to define when jurisdiction arose, but only ruling that a single federal question was sufficient to provide jurisdiction over all other questions. Thus, Marshall next stated that allowing jurisdiction to be frustrated by the presence of non-federal questions would limit jurisdiction to "those parts of cases only which *present* the particular question involving the construction of the constitution or the law." *Id.* (emphasis added). Marshall assumed that the core federal issue conferring jurisdiction upon all issues in the case was presented, if not yet "raised," by plaintiff's complaint.

Moreover, the use of "may" instead of "will" appears more stylistic than substantive in light of Marshall's phrase "provided the facts necessary to support the action be made out." *Id.* That phrase implies that the federal issue is necessarily implied by the allegations made in the complaint. The court in determining jurisdiction assumes that those allegations are true and that the party will provide the necessary evidence later in the suit. While the factual support for the allegations can wait, the allegations in the complaint must establish the presence of federal issues, even if the party may choose not to "raise" those issues immediately.

because the status of the Bank as a "creature" of federal law presented potential, if not well-settled, federal issues in every case.

In this first class of cases, the "original ingredient" must appear from the facts alleged in the plaintiff's complaint.[177] Allowing the defendant to obtain jurisdiction by asserting that the type of action indicates that one party may later in the action present facts raising federal issues (also "potential" issues, but in the sense that these issues might, or might not, develop later in the action), would create unlimited jurisdiction. For example, a defendant in a criminal prosecution might simply assert that he is black, and argue that it is conceivable that he might later raise a federal issue by claiming racial discrimination in violation of the 14th amendment.[178]

The second class of cases encompasses suits where the facts stated in the complaint do not automatically present federal issues. Such a case can "arise under" article III only if a party raises a federal issue that is dispositive of that lawsuit. In the absence of an "original ingredient," a party may not create jurisdiction merely by stating a set of facts from which a federal issue might arise upon the development of other facts. Because there are no federal issues inherent in the character of the action, jurisdiction does not exist unless and until other federal issues are "raised" which are dispositive of

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177. *Id.* at 824.

178. But what about suits *against* federally chartered corporations? *Osborn* held that the Bank of the United States may sue as plaintiff in federal court. Does the character of the federal corporate defendant also automatically raise federal issues sufficient for jurisdiction even though the plaintiff's capacity to sue or act is not a federal question? The Supreme Court has held that this flip side of the coin is governed by *Osborn*. *See* Union Pacific Ry. Co. v. Myers, 115 U.S. 1, 11 (1885). The rationale is that the mere suit against such an entity ensures that its conduct is at issue. As a creature of federal law entirely dependent upon federal authority, those acts will require construction of the corporation's federal charter.

But such inherent issues must still arise from plaintiff's complaint. It is the plaintiff's required allegation of defendant's status that confers jurisdiction because it automatically raises federal issues. Thus, the Court has held that plaintiff cannot avoid those inherent issues by omitting the allegation of defendant's federal status from the complaint. *See* Texas & P.R. Co. v. Cody, 166 U.S. 606, 609-10 (1896).

The prosecution is under no obligation to allege a defendant's federal status. Federal official defendants must raise relevant defenses (the "construction" test) in order to obtain jurisdiction.

Of course, the extension of the flimsy *Osborn* "original ingredient" test to cases filed against federal corporations (or officials) is particularly problematic because most such cases will not involve the authority of the corporation to act (e.g., tort cases).

Finally, the *Union Pacific* case has been characterized as an incorrect decision by the Court, largely because the federally chartered corporations of that time had lost the federal character imbued by the United States Bank; they were basically private entities. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (Frankfurter, J., dissenting) (stating that the decision was considered by many to be a "sport"); Collins, *supra* note 171, at 746-48, 766.

the particular case.[179]

In the typical criminal case, the federal official's status would not be an "original ingredient" of the prosecution. The plaintiff's case in the criminal prosecution would require only a prima facie showing that the official committed an unlawful act with criminal intent. The prosecution would not be required to allege that defendant is a federal official. The prosecution could prevail without first proving that the official did not act in enforcement of federal law, just as plaintiff in an ordinary contract action need not show that his contract is unaffected by federal law. An allegation of necessity or privilege is an affirmative defense,[180] and in the absence of a federal defense, there would be no direct assertion of a federal issue.

Furthermore, while the Bank's status created an actual federal issue in *Osborn*, defendants' status as federal employees would not do so here. Federal employees are not "creatures of federal law,"[181] and the fact that they are employed by the United States when they commit a charged act does not create a federal issue.[182]

But even if the status of the official as employed by the United

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179. *See* Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877). The Court in that case construed *Osborn* as preventing removal under the admittedly narrower general federal question statute where a federal question might be presented only at a later point in the litigation.

180. For example, federal officials seeking a writ of habeas corpus have the burden of showing that they acted pursuant to federal authority. *See* Morgan v. California, 743 F.2d 728, 731 (9th Cir. 1984).

181. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824).

182. Justice Marshall recognized that the mere status of the Bank as an entity created by the United States could not by itself create federal jurisdiction.

> It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank.
>
> *This distinction is not denied*; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the bank arises out of this law.

Id. at 826-27. Justice Marshall's concession was prompted by the dissent's argument that focusing upon the identity of the party instead of the issues raised by the case would create jurisdiction for any case involving federal officials. *Id.* at 901-02 (Johnson, J., dissenting). Justice Marshall did not rely upon the status of the Bank to create jurisdiction directly, but upon the fact that the Bank's status created federal questions concerning all of its acts, including its right to sue. Thus, the official's employment by a federal entity, without more, cannot serve as the basis for article III jurisdiction. Otherwise, article III jurisdiction would extend to all suits by federal employees arising out of off-duty activities.

States is not an "original ingredient," could the fact that the official was performing his federal duties when he committed the charged act provide a nexus with the federal government and federal laws sufficient to invoke the Supremacy Clause? No, because the typical criminal case does not fall into either of the two classes of cases set forth in *Osborn*. As noted above, the fact that the official was on duty is not an "original ingredient" of the prosecution's case.[183] Since there is no "original ingredient" present, this case falls into the second category of cases discussed above. Federal jurisdiction exists only after the official raises a dispositive federal issue. The mere allegation that the official was on duty does not necessarily present a Supremacy Clause issue.

The Supremacy Clause insulates the acts of the United States from state prosecution. By extension, it protects acts of others, such as federal agencies, which are in behalf of the United States. But a federal official is fundamentally different from a federal agency. The federal official is not an inseparable part of the United States; he can act in both a private and official capacity. The problem with the argument that the official's performance of federal duties provides jurisdiction is that actions of an official while on duty are not necessarily (or, in a typical criminal case, even probably) actions taken in reliance upon the laws authorizing his duties. Thus, merely alleging that the official was on duty fails to allege that he committed the charged act in his official capacity and accordingly fails to demonstrate the existence of an "arising under" federal issue.

The dividing line between private and official acts is not whether the official was being paid by the United States when he acted, or even whether he was performing official duties at the time he committed the charged act. The issue is whether the official committed the charged act on behalf of the United States by enforcing or complying with federal law.

The distinction may not be obvious. Suppose that a mail carrier is on his lunch hour, although he is still being paid a salary by the United States for the entire day. While driving to begin his afternoon route, he deliberately runs over a pedestrian. There is no nexus be-

183. *See, e.g.*, Martin v. Wyzanski, 262 F. Supp. 925 (D. Mass. 1967). Plaintiff in *Wyzanski* sued a federal judge for libel after that judge wrote a negative letter about him. The court granted the judge's motion for dismissal for want of federal jurisdiction. The court held that the judge's status and potential official immunity defense alone could not create federal jurisdiction under 28 U.S.C. § 1331 because of the "well-pleaded complaint" rule. *Id.* at 927. Although section 1331 is construed more narrowly than article III, the logic of the decision should apply to both provisions.

tween the Supremacy Clause and the official's on-duty status. Hitting a pedestrian is not an act in official character. The official has committed a private act outside his duty to carry the mail for the United States. Taking the mail carrier out of his lunch hour and placing him on duty delivering mail does not change the analysis. The carrier has still removed himself from his official capacity and his "scope of employment" by committing an unauthorized act not required to deliver the mail.[184] The fact that he was on duty does not

184. To argue that article III jurisdiction encompasses such acts because they were committed "within the scope of his employment" begs the question. *See, e.g.*, California v. Mesa, 813 F.2d 960, 968 (9th Cir. 1987) (Noonan, J., dissenting). Assume that a mail carrier drives his truck down the sidewalk, running over pedestrians. The mail carrier's actions other than the charged act may have been committed within the scope of his employment. But the issue of whether his hitting a pedestrian was within the scope of employment for purposes of a criminal action is an issue to be raised via a federal defense, and only then is it decided.

In *Mesa*, simply stating that hitting a bicyclist (or a police car) was an act committed within the "scope of employment" did not put the laws authorizing those duties into issue. The official certainly did not contend that those laws authorized his allegedly negligent driving. Rather, he alleged that the accident occurred while he was on duty and acting in the course and scope of his employment. Stating that the alleged criminal act occurred while he was discharging his duty did not present a federal issue because it said nothing about why the charged act was committed; he stated only that he was doing other proper things when the incident occurred. "Scope of employment" in practice means nothing more than that the official was on duty.

The phrase "scope of employment" appears to have been borrowed from official immunity cases, where the official may assert a federal defense in a *civil* suit by showing that he had the discretion to commit the act by virtue of his federal authority. *See* Westfall v. Erwin, 108 S. Ct. 580 (1988). But facts which raise federal issues in such cases do not necessarily raise them in criminal actions. A simple statement that the official was on duty in a typical civil case may well raise a federal issue sufficient for removal because it actually alleges a federal defense. *See* Willingham v. Morgan, 395 U.S. 402, 409 (1969). But the same statement in *Mesa* did not raise a federal issue because the official immunity doctrine does not apply to criminal cases. The related doctrine of federal immunity requires the official to demonstrate that his acts were necessary and proper to the exercise of his federal authority. *See In re* Neagle, 135 U.S. 1 (1890). The official does not assert that defense merely by claiming that he was on duty at all times.

Finally, defining "scope of employment" invites difficulties. The presumption is that certain acts are not within the "scope of employment" because they are inherently reckless or apart from the mandated duties ("on a frolic of his own"), and that all other activities performed while on duty are covered. However, the determination of the underlying facts (i.e., was the mailman driving 25 mph or 100 mph; was he intoxicated?) will often comprise the case to be decided. The gravamen of the criminal action is that the official acted in a criminal manner. The criminal complaint will often provide no facts except to identify the charges filed. Thus, the determination of whether the official acted within the "scope of employment" would be based upon the official's allegations. Those allegations will always indicate that the official was acting within the scope of employment. The "scope of employment" test would be reduced to a declaration that the official was on duty at the time the incident occurred. The federal official fails to make the connection between the laws authorizing his duties and the charged act. He only tells us what he was supposed to be doing, but not what he actually did. Only the federal defense requirement forms the proper boundary for article III jurisdiction because the assertion of the defense actually presents federal issues.

change the character of the alleged act.

The focus must instead be on whether the carrier relies upon the laws authorizing his duties to justify the collision. If he fails to do so, then the issue of whether he acted in an official capacity is not in dispute, and there is no nexus between the prosecution and the Supremacy Clause sufficient to make the case "arise under" the Constitution. A case cannot "arise under" a law that is irrelevant to the disposition of the action. The official must supply the nexus in each case by alleging a federal defense bringing his "official character" into issue.[185]

B. *Protective Jurisdiction*

We have seen that prosecutions of federal officials in the absence of a federal defense do not "arise under" article III under the traditional analysis of that provision. However, scholars have suggested that Congress may grant federal jurisdiction over cases involving no federal issues where there is a "substantial Article I interest."[186] This theory of "protective jurisdiction" asserts that a case "arises under" article III when Congress grants jurisdiction to advance an article I interest. Adherents suggest that Congress must be able to provide a federal forum when it is necessary to the execution of its article I powers.

There appear to be two "types" of protective jurisdiction, each asserting a different source of congressional power to confer jurisdiction in the absence of a federal issue. The first theory suggests that Congress may provide jurisdiction over any case where it has the

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185. This is even more compelling where, as here, the defendant official has the opportunity to choose his own facts. He may choose to create a federal issue by alleging a federal defense. What he cannot do is allege only those facts sufficient to suggest a mere possibility of a federal issue when he knows whether facts actually creating that issue exist. This type of selective factual allegation was the impetus behind the Supreme Court's strict "causal connection" test in *Soper (No. 1)*. Thus, the official may not allege that he was on duty when he hit the pedestrian (which raises the faint possibility that he may have relied upon federal law when he committed the charged act), but fail to state whether he in fact relied upon federal law in doing so. Justice Frankfurter argued in his dissent in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481-82 (1957), that federal jurisdiction should not extend to "potential" federal issues. Rather, Congress could and should provide removal jurisdiction to defendants raising concrete federal issues. *Id.* at 477-79 (Frankfurter, J., dissenting).

Otherwise, Congress could mandate federal jurisdiction for cases involving any federal official because it is possible that the official was enforcing federal law when he committed the charged acts. Off-duty acts could be removed under such a standard. In addition, off-duty officials might seek removal because of "the potential" that subsequent facts would indicate that their prosecution was motivated by animus toward federal officials.

186. *See Protective Jurisdiction*, *supra* note 171, at 959.

power under article I to enact laws governing the outcome of that case.[187] This theory is generally associated with the term "protective jurisdiction." The second theory abstains from relying on the power to create substantive law in favor of a less concrete ground: the power of Congress to create a federal forum to protect federal "interests."[188] Whatever the merits of either form of "protective jurisdiction" generally, both theories fail to justify federal jurisdiction over criminal prosecutions against federal officials in the absence of a federal defense.

1. *Jurisdiction Based Upon the Power of Congress to Enact Substantive Law*

Professor Wechsler neatly states the contours of the first theory when he explains that jurisdiction extends to "all cases in which Congress has the authority to make the rule to govern disposition of the controversy, but is content instead to let the states provide the rule so long as jurisdiction to enforce it has been vested in federal court."[189] This theory has been criticized by the Supreme Court because it is a principle without limitation. Thus, Justice Frankfurter opined in *Lincoln Mills*,[190] that "every contract or tort arising out of a contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case."[191] More recently, the Court in *Northern Pipeline Co. v. Marathon Pipe Line Co.*,[192] criticized a similar formulation of the theory. Respondents in *Northern Pipeline* sought to justify adjudication of bankruptcy cases by article I courts by contending that Congress may delegate article III matters to article I courts where Congress has the power under article I to create the laws adjudicated by those courts.[193] The Court rejected this rationale

187. *See* Wechsler, *supra* note 74, at 224-25.

188. *See Protective Jurisdiction*, *supra* note 171, at 961.

189. *See* Wechsler, *supra* note 74, at 224; *Protective Jurisdiction*, *supra* note 171, at 960.

190. 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting).

191. *Id.* Frankfurter's comments on forum-based jurisdiction are discussed *infra* note 199.

192. 458 U.S. 50 (1982).

193. *Id.* at 72-73. This formulation is actually narrower than Professor Wechsler's theory in that it already assumes that the controversies fit within article III. The formulation seeks only to allow different federal courts to adjudicate article III cases. Professor Wechsler attempts to bootstrap non-federal cases into article III controversies based upon Congress' unexercised power to bring such controversies within article III.

because "it provides no limiting principle."[194]

Furthermore, this theory may be irrelevant because there does not appear to be any article I power justifying such regulation of state criminal law in the absence of an attack upon federal law or authority. Congress cannot provide federal rules of decision for litigating traffic tickets outside of the rights afforded by the Constitution,[195] and the mere prosecution of a traffic ticket does not invoke those rights.

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194. *Id.* at 73.

195. There is currently no federal common law governing prosecution of federal officials. Congress could certainly enact laws preventing the harassment of officials, or the conviction of such officials asserting federal defenses. However, it seems unlikely that Congress has the power under article I to enact special federal criminal laws governing the prosecution of ordinary traffic citations even under the necessary and proper clause because there does not appear to be an enumerated power available to justify such a law.

The two article I powers interpreted most expansively, the power to tax and to regulate commerce, appear to bear little relationship to prescription of substantive rules governing trials of all federal officials for acts committed while on the job, but unconnected with federal authority. Commerce is unaffected by prosecutions of federal officials for acts unconnected with federal authority. That a mail carrier is incarcerated because he hit a pedestrian while on duty, rather than while on vacation, does not affect commerce. Similarly, the United States fisc is not affected by trying federal officials in state courts, since a guilty verdict may not collaterally estop the United States in a subsequent action. *See* United States v. Mendoza, 464 U.S. 154 (1984) (United States cannot be the subject of offensive collateral estoppel even when it was a party in the previous action). It is not surprising, then, that the Supreme Court upheld the constitutionality of the earlier removal statutes because they allowed federal officials to litigate federal defenses in federal court. *See* Tennessee v. Davis, 100 U.S. 257, 270-71 (1880); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 254 (1867). But the Supremacy Clause only prevents states from convicting officials for conduct justified under federal law.

Indeed, the Supreme Court has expressed doubt that Congress can enact laws prohibiting states from hindering mail delivery by arresting on-duty mail carriers on pre-existing warrants. The Court in United States v. Kirby, 74 U.S. 482 (1868), held that a federal law preventing detention of persons carrying the mails did not apply to state officials who had arrested a mail carrier on a felony warrant. The Court expressed doubt that such a law invading state sovereignty would be constitutional. *Id.* at 486. The law in *Kirby* at least might be justified by Congress' interest in ensuring that the delivery of mail, a federal function guaranteed by the article I postal power (U.S. CONST. art. I, § 7, cl. 7) was not interfered with by state officials. However, the trial of a mail carrier does not directly interfere with mail delivery, just as the trial of any other federal official does not directly obstruct that official's activities. It is difficult to believe that the Framers were willing to allow the federal government to invade state sovereignty under such circumstances. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 189 (1953) (suggesting that Congress might not have had the power to enact laws governing all transactions of the Bank of the United States; it follows that Congress does not have the power to regulate all lawsuits arising from the acts of federal officials committed in their private capacity). Adherents to this theory indicate that Congress provides jurisdiction by moving to protect its regulation of an area or a national policy; neither exists with regard to federal officials acting in their private capacity while on duty.

2. *Jurisdiction Based on the Power of Congress to Create a Federal Forum*

Other scholars do not believe that the power of Congress to confer jurisdiction depends upon its power to enact substantive law. Rather, these theorists argue that Congress has the power to create a federal forum to protect "federal interests." They assert that Congress has the power to enact laws to protect federal interests from discrimination even in the absence of federal laws or regulation in a particular area.[196]

There are several problems with this idea. First, the Supreme Court appeared to disagree with this principle in *Verlinden B.V. v. State Bank of Nigeria*.[197] The Court noted that a purely jurisdictional statute could not serve as the federal statute under which the cases arise.[198] However, since "forum-based" jurisdiction is based upon a "federal interest" and not an actual federal statute, the only federal law available for the cases to "arise under" is the jurisdictional statute.

Second, "forum-based" jurisdiction stretches the "arising under" language of article III past the breaking point. Such cases would not arise under "the law and Constitution," but under "federal interests." "The law and Constitution" is clearly definable; "federal interests" are whatever Congress or the courts say they are at a particular time.

This new source of power also imperils federalism by severing

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196. *See Protective Jurisdiction*, *supra* note 171, at 963-64 (summarizing views of other scholars). This Note proposes a more conservative version of "forum-based" jurisdiction requiring that Congress have a "substantial" interest in removing the subject-matter from state jurisdiction.

> [T]he jurisdictional grant must not be broader than the forum-based interest warrants. The necessity of enforcing labor agreements in federal court, for example, could not support a grant of jurisdiction over all contract disputes affecting commerce. It is the prohibition against overbreadth that prevents the forum-based model of protective jurisdiction advanced in this Note from engulfing the remaining heads of article III jurisdiction.

Protective Jurisdiction, *supra* note 171, at 959. This prohibition should extend to cases lacking a federal defense. Other commentators have suggested that only a "necessary and proper" standard might be used, which really means that "anything goes." *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WESCHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 416, § (2)(d) (2d ed. 1973).

197. 461 U.S. 480 (1983).

198. The Court held that cases could arise under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a) (1976), because that Act was not a purely jurisdictional statute, but prescribed substantive federal rules governing suits against other nations. *Verlinden B.V.*, 461 U.S. at 495-97. *See* California v. Mesa, 57 U.S.L.W. 4199 (U.S. Feb. 21, 1989) (No. 87-1206).

the connection between the existence of relevant federal law and jurisdiction. Under "forum-based" jurisdiction, Congress need not have the power to enact a federal law regulating an area in order to provide jurisdiction over cases arising out of that area. Instead, Congress could provide for federal adjudication of issues based upon a "federal interest" in their resolution. But the Constitution defines the limits of such "federal interests;" if Congress cannot enact a law or legislative scheme to protect such interests, perhaps those interests should not be protected.

Federal instrumentalities are a good example. Scholars point to *Osborn* as an example of a decision that can only be justified by a "forum-based" jurisdiction depending upon the congressional "interest" in preventing state discrimination against its instrumentalities.[199] The problem is that this principle creates a "slippery slope."

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199. *See Protective Jurisdiction*, *supra* note 171, at 972. Professor Mishkin has flatly stated that article III jurisdiction encompasses cases involving the United States, its agents, and its instrumentalities. Mishkin, *supra* note 195, at 193. However, the passage containing that statement indicates that Mishkin used "agents" to refer to government agencies. Mishkin, *supra* note 195, at 193.

Furthermore, suits against the government (or its agencies) are different from suits against federal officials. Clearly, Mishkin is correct when he states that jurisdiction exists in cases involving the United States, as any case involving the activities of the United States tests the authority of the United States to act under federal law; that question is an "original ingredient" of the lawsuit. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). Of course, *Osborn* also settles the instrumentality issue, albeit in an unsatisfactory manner. But criminal prosecutions against federal officials do not involve the United States or the Supremacy Clause in the absence of a federal defense.

While on the subject of discomforting pronouncements, we must take up Justice Frankfurter's discussion of section 1442(a). *See Textile*, 353 U.S. at 475 n.5 (Frankfurter, J., dissenting). Frankfurter criticized "protective jurisdiction" as providing for jurisdiction based upon distrust of state courts in construing state law. His argument was that the limits of such distrust had to be the Constitution as expressed by article III (i.e., diversity jurisdiction).

For some inexplicable reason, Frankfurter felt obliged to account for section 1442(a)(1), even though, as discussed above, that section was intended to prevent adjudication of federal law, as opposed to biased tribunals in cases wholly under state law. He first properly distinguished the removal statute by finding that the statute had been interpreted as requiring a federal defense. *Id.* ("that put federal law in the forefront as a defense") (interpreting *Davis*, 100 U.S. 257 (1880)).

Unfortunately, Frankfurter also felt obliged to provide an alternate, and incorrect, rationale:

> In any event, the fact that officers of the Federal Government were parties *may* be considered sufficient to afford access to the federal forum. [citations omitted]. "Without doubt, a federal forum should be available for all suits involving the Government, its agents and instrumentalities, regardless of the source of the substantive rule."

Mishkin, *supra* note 195, at 193 (emphasis added).

First, the use of the word "may" suggests that Frankfurter had some doubts about this pronouncement. Second, he appears to have misinterpreted Mishkin's statement to refer to federal officials instead of government agencies. Or, like Mishkin, Frankfurter may have as-

It assumes that state courts might discriminate against certain quasi-governmental entities. However, if we assume that state courts might not fairly treat entities connected with the federal government in the civil arena, we must assume that private contractors working for the federal government might also be discriminated against. Should we allow Congress to confer federal jurisdiction for all suits involving any person performing services for the federal government, where the charged act occurred while on the job but is otherwise unconnected with federal law? Where should we draw the line?

The problem is more severe when we turn to federal officials. At least government instrumentalities are products of federal law, and we can be confident that such instrumentalities will generally act on behalf of and as an agent for the United States. We cannot be as confident regarding federal officials, who commit negligent or intentional acts apart from their official character even while on duty. Thus, even if "forum-based" jurisdiction has any viability, the line must be drawn to include instrumentalities, but to exclude federal officials.[200]

Furthermore, although Congress may have an interest in protecting federal officials from hostile state courts in actions where no federal defense is presented,[201] how far does that interest extend?

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sumed that federal officials would be acting in their official capacities when suing or being sued. He appears not to have considered the possibility that the official might have been on duty but acting in a private capacity (i.e., without a federal defense). Thus, his only support for that statement (aside from Mishkin) was *In re* Debs, 158 U.S. 564 (1895), which held that Congress could apply to the courts for an injunction against activities interfering with its article I powers over interstate commerce.

Of course, the United States must have access to a federal forum to exercise its constitutional powers; such cases arise under the Constitution. But *Debs* does not speak to instrumentalities or federal officials acting in a private capacity. And federal officials really are not "agents" when they so act. *Debs* really only stands for the proposition that federal jurisdiction is coextensive with the Supremacy Clause, which is also the appropriate interpretation of section 1442(a).

To the extent that Frankfurter meant to refer to all officials who committed private acts while on duty, he is bereft of support and this author respectfully disagrees with his footnote.

200. This author does not reach a conclusion as to whether article III affords federal jurisdiction to instrumentalities, as it is enough for our purposes that federal officials clearly should not be allowed such jurisdiction in the absence of a federal defense that clearly implicates such interests. However, at least one commentator illustrates the perils of "forum-based" jurisdiction when he states that the interests of the federal government may have changed enough over time that federal jurisdiction over instrumentalities is no longer necessary and thus perhaps no longer available. *See Protective Jurisdiction*, *supra* note 171, at 974.

201. However, it should be noted that Congress waited until 1961 to enact the Federal Driver's Act. *See supra* note 75. Before the Act, federal drivers could be sued in state court despite their having committed the charged act while on duty. *See supra* note 75. That Act only covers federal drivers; other federal employees still may be sued in state courts. Thus, Congress certainly has not felt a compelling need to protect federal officials from hostile state

Should we allow federal jurisdiction when a federal official is sued by his neighbor for taking his neighbor's lawn mower and not returning it? Should it matter that the federal official ostensibly was delivering mail to his neighbor when he took the lawn mower? There are no reasonable guidelines for evaluating the potential for state prejudice, and no realistic means of eliminating it wholesale without federalizing our judicial system and creating a protected class of federal officials. Of course, since "forum-based" jurisdiction depends upon a basis for congressional concern over prejudice against "federal interests," it should also be relevant that there is currently no evidence of such prejudice in the United States today.

In sum, even if we acknowledge the legitimacy of protective jurisdiction,[202] that theory has limits. Trying to create federal jurisdiction for all persons connected with the United States who may be the subject of state enmity is unworkable. But the United States can create jurisdiction for itself, and the United States is able to undertake activities which encounter state opposition. And where an official acts on behalf of the United States and has a federal defense, federal jurisdiction is available. The Supremacy Clause also provides jurisdiction where a state harasses a federal official undertaking such activities. Thus, the operations of the federal government are adequately protected within the current boundaries of article III jurisdiction as expressed by the federal defense requirement. Protective jurisdiction for federal employees is thus unnecessary.

V. HABEAS CORPUS IS THE PROPER REMEDY FOR HARASSMENT

There are major differences between the writ of habeas corpus[203] and removal.[204] The writ is collateral to trial. The writ

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courts.

202. Some commentators have suggested that protective jurisdiction must exist because it provides the only basis for the right of a trustee in bankruptcy to sue in federal court on wholly state causes of action. *See Protective Jurisdiction, supra* note 171, at Appendix A. However, there are three plausible explanations for such jurisdiction. First, the trustee presents federal issues under *Osborn* every time it sues in federal court as an instrumentality of the United States. This is particularly true with the introduction of United States Trustees in 1989. *See* 28 U.S.C. 581 (1982). The trustee will be nonsuited if it does not enjoy the right to sue on behalf of the United States.

Second, the Bankruptcy Code is not merely a jurisdictional statute. State causes of action tried in federal court are subject to the procedural and substantive restrictions of the Code. Thus, as with the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a) (1982), the Code provides jurisdiction for state causes of action. *See Verlinden B.V.*, 461 U.S. 480 (1983). Finally, the federal court enjoys pendant jurisdiction over the state causes of action, as those claims will affect the estate over which the bankruptcy court has jurisdiction.

203. *See* 28 U.S.C. § 2241(c)(2), (3) (1982).

requires the state to justify its detention of the official, and the district court decides whether the state's showing indicates that the official is held in violation of federal law or the Constitution.[205] If the state prevails, the official must stand trial in state court. If the detention is found unlawful, the official is discharged.[206] Unlike removal, only one hearing is held upon a petition for a writ of habeas corpus.

A. *A Brief History of the Writ Indicates That Congress Intended It to be Used to Resolve Harassment Claims*

Although the writ of habeas corpus ("the writ") is as old as English common law, its introduction into American law was gradual. The writ provisions of the Judiciary Act of 1789 did not apply to prisoners held in state courts.[207] The writ was expanded when the federal official removal statute was reenacted as part of the 1833 Act.[208] Along with the remainder of the Act, it applied to prisoners confined in state facilities. The writ could be issued "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court."[209]

The next expansion occurred in 1842 and allowed prisoners to apply for the writ on the ground that their actions were justified

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204. A third alternative, rarely employed, is a declaratory judgment action to enjoin prosecution. *See* Baucom v. Martin, 677 F.2d 1346, 1349, 1350 (11th Cir. 1982). Such cases generally litigate the federal immunity defense, discussed *infra* note 215. The procedure should be similar to habeas corpus, except that a finding of immunity leads to an injunction instead of discharge.

205. The abstention doctrine, requiring petitioners to exhaust state remedies before filing a writ, does not prevent federal officials from proceeding directly to federal court. The possible restraint on the federal government mandates immediate review. *See* United States *ex rel.* Drury v. Lewis, 200 U.S. 1 (1906); Morgan v. California, 743 F.2d 723 (9th Cir. 1984).

206. *In re* Neagle, 135 U.S. 1 (1890).

207. Act of September 24, 1789, ch. 20, § 14, 1 Stat. 73, 82. *See also* Amsterdam, *supra* note 52, at 806 n.54. Professor Amsterdam presents an excellent history of the writ, as did the Court in *Neagle*, 135 U.S. 1 (1890).

208. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 632, 634.

209. *Id.* Note that this provision, like the removal provisions of the same statute, focused upon the act of the individual in enforcing or complying with federal law. The statute was not limited to federal officials, indicating that Congress was interested in the act, and not the actor. It appears that Congress was only interested in protecting persons who attempted to enforce the revenue laws.

This statute protected officers and other persons executing court orders. It is possible that Congress added this remedy to avoid confusion over whether an official executing a court order based upon the revenue laws was entitled to removal. This problem did emerge later with the removal statute. *See supra* text accompanying notes 64-71. But there is nothing in the legislative history suggesting that Congress intended either remedy to encompass cases unrelated to federal law.

under the Law of Nations.[210] Again, the focus was not on the status of the actor, but on the character of his defense. The writ was further expanded to its present dimensions in 1867; it now applies to cases where the prisoner is held "in violation of the Constitution, or of any treaty for law of the United States."[211] The writ is clearly based upon the character of the prisoner's claim.

While Congress crafted the removal statute as a limited jurisdictional device to transfer federal questions to federal courts, the expansion of the writ in 1867 was intended to extend habeas corpus jurisdiction to its constitutional limits.[212] This suggests that while Congress did not intend the removal statute to encompass all forms of harassment,[213] it was concerned about harassment. Congress intended the writ of habeas corpus to be available as a remedy against harassment against federal employees, since such harassment implicates the Supremacy Clause of the Constitution.[214]

B. *The Writ Still Provides an Alternative Procedure for Asserting a Federal Defense*

Before turning to the recent employment of the writ against harassment, it should be noted that the writ may be used to assert a federal defense. The official may seek discharge by a federal judge on the grounds that his acts were necessary to performance of his federally mandated duties. To obtain discharge on the writ, the federal official must prove that he acted in pursuit of federal law. However, the official loses the benefit of the reasonable doubt standard; the

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210. Act of August 29, 1842, ch. 257, 5 Stat. 539; *Neagle*, 135 U.S. at 2.

211. Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2241(c)(3) (1958)).

212. *See Ex Parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867). The legislative history of the 1867 Act suggests that it was aimed at all forms of harassment of federal officials and those who sided with them during the Civil War. Although the 1863 and 1866 removal statutes share similar roots, they tracked the language, and retained the limited jurisdiction of, their forebearers, the 1815 and 1833 Acts. Indeed, the 1867 habeas corpus statute has been described as a tougher response to state evasion of the removal statutes (including those copied into the 1866 Civil Rights Act, Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27). *See also* Amsterdam, *supra* note 52, at 885 n.385.

213. *See* Maryland v. Soper (No. 2), 270 U.S. 36 (1926).

214. The original provisions of the 1833 Act remain as section 2241(c)(2). The language of that section tracks the removal statute included in that Act, suggesting that Congress did not intend that section to be construed more broadly than the removal provision. Thus, there may be reason to interpret section (c)(3) more broadly than (c)(2). However, both sections have been used interchangeably as grounds for discharge by federal officials. *Compare* Morgan v. California, 743 F.2d 728, 731 (9th Cir. 1984) and Clifton v. Cox, 549 F.2d 722, 725 (9th Cir. 1977) (both cases citing (c)(2)), *with*, *Neagle*, 135 U.S. at 19 (relying upon (c)(3), but citing earlier cases brought under (c)(2)).

facts are viewed in the light most favorable to the prosecution.[215]

215. It must be clear after viewing the evidence in the light most favorable to the state that the official acted within the scope of his federal authority and that his actions were necessary and proper to carry out that authority. Gay v. Ruff, 292 U.S. 25, 31 n.23 (1934). *Morgan*, 743 F.2d at 733. The issue of the official's authority is a question of law to be decided by the district court. A different standard exists for claims of harassment. *See infra* text accompanying note 220. However, this two-pronged test has been interpreted very broadly to include cases where the federal official's conduct was not within his authority. Every court that has recently considered the question has held that the federal immunity defense protects federal officials who have a good faith and reasonable belief that their actions were within their authority. *See* Kentucky v. Long, 837 F.2d 727, 752 (6th Cir. 1988) (collected cases) (holding that summary judgment was appropriate in removed criminal case; official must have reasonably thought at the time that their acts were necessary and justified); Baucom v. Martin, 677 F.2d 1346, 1350 (11th Cir. 1982); *Morgan*, 743 F.2d at 733 (citing Clifton v. Cox, 549 F.2d 722, 730 (9th Cir. 1977)).

Some courts have even dropped the requirement that the action actually have been reasonable at the time it was taken (as opposed to reasonable in hindsight), so long as the official acted in good faith. One court has analogized federal immunity to official immunity, suggesting that the non-malicious exercise of authority, even if beyond the bounds of federal law and reasonableness, is grounds for discharge because it negates any possibility of criminal intent. *See Clifton*, 549 F.2d at 726-27 and cases collected therein. *Morgan*, 743 F.2d 728 (9th Cir. 1984) (following *Clifton*).

The rationale has been that the Supremacy Clause prohibits states from punishing officials criminally for their mistakes. If the official did not possess criminal intent, then he cannot be guilty of a crime under state law because he was merely attempting to perform his duties. If he cannot be guilty under state law, then he certainly cannot be guilty under federal law. Assuming that honest belief is a defense, then the federal courts must decide whether the defense has been made in a particular case.

But there are no Supreme Court cases holding that the Supremacy Clause shields an official from a good faith act in excess of his authority under federal law. Although the recent cases rely upon *Neagle*, 135 U.S. 1 (1890), the Court in *Neagle* only found that the officer acted within his authority. The only other Supreme Court case on this point was decided over eighty years ago. The Court denied relief because of conflicting evidence as to whether the officer acted in excess of his federal authority without considering whether it could be inferred from the undisputed evidence that the official had acted in good faith. *See* United States *ex rel.* Drury v. Lewis, 200 U.S. 1, 5 (1906). *See also Clifton,* 549 F.2d at 731 (Merrill, J., dissenting).

Although the federal immunity defense is closely linked to the official immunity defense, there are few similarities. The official immunity defense protects the discretion to exercise authority; acts outside of that authority are not protected. If the analogy is pursued, a good faith mistake would not be a defense. *But see Clifton, id.* However, there is considerable force to the argument that federalism demands that the federal government, not the states, punish errant federal officers for their mistakes. If that is so, then allowing the states to decide when mistakes of judgment were made defeats that purpose.

This author merely poses the issue without making the sizable digression away from our topic necessary to offer even a tentative resolution. However, the issue is almost completely moot, because the issue of good faith, and thus criminal intent, is virtually always an issue where the federal official claims an attempt to follow federal law. Although the issue can be posed as whether states should be allowed to decide whether federal officials who have exceeded their authority intended to do so, section 1442(a)(1) in practice grants federal jurisdiction to officials who can colorably allege that they acted within the confines of federal law. In addition to their federal defense, their state-law defenses (i.e., lack of intent) are also tried in federal court. Considerations of judicial economy suggest that the federal official make his

Although this last feature makes the writ a less favorable remedy in most cases, the writ was the only remedy available for most federal officials until the removal statute was extended in 1948.

C. *Recent Cases Suggest That Habeas Corpus Is an Appropriate Remedy for Harassment*

The habeas corpus statute encompasses all cases where the federal official is confined in violation of the Constitution.[216] The Supremacy Clause prohibits the malicious prosecution of federal officials based upon their status. It should be irrelevant whether the animus toward the official is based upon past acts in enforcement of federal law, current enforcement, or merely prejudice against the federal government generally.

The Ninth Circuit has recently recognized that the writ may issue to prevent malicious prosecution. In *Morgan v. California*,[217] the court noted that the traditional reticence of federal courts to invade the province of state jurisdiction over criminal matters does not apply where the prosecution is motivated by an intent to frustrate the enforcement of federal law.[218] It is a small step from that principle to the conclusion that any prosecution against a federal official motivated by animus toward the federal government is also motivated by animus toward the enforcement of federal law.

The Ninth Circuit was not clear about how such claims were to be evaluated, stating only that discharge would be appropriate "[i]f, after holding an evidentiary hearing, it is apparent to the district judge that the state criminal prosecution was so intended, the writ should be granted even if the judge has to resolve factual disputes to arrive at that conclusion."[219] The burden of proof should be on the federal official, although exactly what standard should be applied is unclear.[220] More important than the allocation of the burden of

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defense of good faith in the habeas corpus proceeding, rather than allowing his petition to be denied and reconsidered with the entire case at trial.

Furthermore, this issue does not affect the usual case of negligence because in those cases the official cannot allege that the charged acts were the result of his attempt to enforce federal law through exercise of his official authority.

216. 28 U.S.C. § 2241(c)(3) (1976).

217. 743 F.2d 728 (9th Cir. 1984).

218. *Id.* at 733 (finding no improper motive in that case).

219. *Id.*

220. The Ninth Circuit merely stated that the district court has the power to discharge the official if "it is shown that the state criminal prosecution is intended to frustrate the enforcement of federal law." *Id.* However, that language implies that the burden of proof is on the official.

proof is the fact that the writ provides a separate proceeding for challenging harassment.[221]

D. *Resolving Harassment Claims By Writ of Habeas Corpus Instead of Removal Still Protects Federal Employees*

This article has argued that Congress only intended to allow removal of cases where the official can allege a federal defense justifying his commission of the charged act. But this "bright line" standard may foreclose removal of harassment claims. Federal officials may contend that the writ of habeas corpus is an inadequate remedy, and ask Congress to amend section 1442(a)(1) to allow removal of cases upon an allegation of harassment. However, such an amendment would cause more problems than it would solve.

As discussed earlier, the Supreme Court has ruled that malicious prosecutions alleging that the official committed illegal acts while off duty are not within the ambit of section 1442(a)(1).[222] Thus, states intent on harassment could simply wait until the official leaves work before issuing him a speeding ticket. At a minimum, section 1442(a)(1) would have to be amended to cover all forms of harassment.

Moreover, such an amendment would still conflict with the

It would be logical to require the official to demonstrate harassment by a preponderance of the evidence. The official could also litigate any federal defenses he wished to present, although the facts would be interpreted in the light most favorable to the prosecution. However, the official could still seek removal based upon his federal defenses if his harassment claim and federal defenses were insufficient for discharge on the writ. *See infra* note 221.

221. It is unclear whether an unsuccessful petition for writ of habeas corpus estops removal based on the same federal defenses. Since the district court can only grant the writ where the facts viewed in the light most favorable to the state support discharge, it would be unfair for the federal official to have to give up the additional protections of a full-blown trial on the federal defenses in order to raise a harassment claim on habeas corpus. *See* Clifton v. Cox, 549 F. 2d 722, 731 n.1 (9th Cir. 1977) (Merrill, J., dissenting) (noting that a denial of the writ should not preclude removal).

It would also be unwise to force the federal official to forego raising his federal defenses on a writ petition in order to preserve his right to remove the case. The writ is an extraordinary remedy designed to discharge the official where state interference with federal law is clear. We therefore should not discourage officials from raising all meritorious federal claims in their writ petition. Although this allows the official two "bites at the apple," in practice the official is unlikely to take the time and trouble to file a habeas corpus petition in routine criminal prosecutions because of the higher standard of proof required for discharge on the writ. Any such frivolous petitions can be disposed of quickly. The extra procedural step is a small price to pay to preserve federal law.

The district court should still be able to make an independent determination as to whether the defenses presented as grounds for removal are "colorable" without regard to the prior writ proceedings. This step would also prevent frivolous claims.

222. *See* Maryland v. Soper (No. 2), 270 U.S. 36 (1926).

standard set forth in *Soper (No. 1)* for officials contesting the facts alleged in the indictment. Although *Soper (No. 1)* appears to allow removal where the official claims he was harassed, that standard is rigorous. The official must negate any inference that he committed an act unprotected by federal law.[223] Negating the inference of criminality requires the officer to prove at the evidentiary hearing that he did not commit a crime. This burden is heavy, and would transform the evidentiary hearing into a trial on the merits. Although the Court in *Soper (No. 2)* suggested that Congress could amend the removal statute to allow removal upon an allegation of harassment, the Court contemplated that Congress would require the official to bear the burden of proof at the evidentiary hearing.[224] This burden of proof probably would be equivalent to the habeas corpus standard.

It is only a small step from the Court's contemplated amendment to the habeas corpus remedy—the only difference is the substitution of a judge for a jury. The change would save time and money by substituting one habeas hearing for one evidentiary hearing plus a trial.[225] This substitution does not adversely affect the federal official because a judge adequately protects him from harassment.[226] The

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223. *See supra* note 118.

224. [W]e can only say that if prosecutions of this kind come to be used to obstruct seriously the enforcement of Federal laws, it will be for Congress in its discretion to amend [the statute] . . . to mean that any prosecution of a Federal officer for any state offense *which can be shown by evidence* to have had its motive in a wish to hinder him in the enforcement of Federal law may be removed for trial . . . . [B]ut what we wish to be understood as deciding is that the present language of [the statute] cannot be broadened by fair construction to give it such a meaning.

Soper (No. 2), 270 U.S. at 43-44 (emphasis added). The Court implied that the official bears the burden of producing evidence of improper motive. The burden borne by the official seeking habeas corpus based upon a claim of harassment is unclear, but appears to be a preponderance of the evidence. *See supra* notes 217-21.

225. The change would not make sense for cases involving only federal defenses because the evidentiary hearing for such cases would be very short; the court need only verify that the facts suggest a feasible federal defense. Removal makes sense under such circumstances. Furthermore, for cases not involving harassment claims, the facts are construed in favor of the prosecution in determining whether the writ should issue. *See supra* note 215. Requiring officials to meet that higher standard to prevail on a federal defense would be unfair. However, that standard is appropriate where the official seeks pre-trial release in the absence of a federal defense or harassment claim.

226. Indeed, certain harassment claims must be heard by the court. A claim of malicious prosecution requires consideration of the underlying facts of the case. But a claim of selective prosecution is divorced from the merits, frequently relying upon statistics concerning enforcement of the state statute. The few cases which have considered the issue agree that a defense based upon selective prosecution must be tried to the court because the defendant's guilt or innocence is irrelevant. *See* United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973). Thus, the

official alleging harassment gains little from a jury trial. Except in rural areas, the composition of the state and federal jury pools will not be radically different; the venire will still be drawn from the "hostile" state. A federal judge will certainly be unbiased; a federal jury might not be. The goal is to transfer harassment claims into federal court; the identity of the trier of fact is secondary. Furthermore, there will be no practical difference in handling routine traffic cases, as the availability of a jury is a function of state law. Most states do not allow jury trials on infractions.[227]

Although the "preponderance of the evidence" standard for harassment claims may appear to be too strict, a lower standard will not work. Allowing removal of harassment claims where the official makes out a "colorable" showing of harassment would work too well because the harassment allegation could be made so easily. The "colorable" standard is certainly the lowest burden imposed upon a moving party. For example, the official in *Mesa*,[228] might "colorably" allege that his having run into a state police car, along with his status as a federal official, prompted the issuance of the traffic ticket.[229] The district courts would have to allow removal whenever harassment was alleged.

Moreover, the evidentiary hearing would not be the swift and efficient exercise suggested by 28 U.S.C. § 1446, and it would not screen out most harassment claims. The hearing would not focus solely upon the harassment allegations, but turn into a mini-trial on the merits. The official would argue successfully that a complete presentation of his case on the merits is necessary because his showing of innocence will eliminate any proper motivation for the prosecution. Thus, the official could use the harassment allegation to "bootstrap" his case on the merits into the evidentiary hearing before the district court.

District courts would allow many federal officials to proceed to trial on the merits on the theory that the jury would weed out unmeritorious claims. This is particularly true where the district court, after hearing the official's presentation on the merits, is sympathetic to the official's defense even while believing that the prosecution was

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only issue is whether a judge should hear claims of malicious prosecution.

227. *See, e.g.*, Aurora v. Erwin, 706 F.2d 295 (10th Cir. 1983).

228. 813 F.2d 960 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 1993 (1988), *aff'd*, 57 U.S.L.W. 4199 (U.S. Feb. 21, 1989) (No. 87-2106).

229. Indeed, the Deputy Solicitor General for the United States appeared to advance that argument in his presentation to the Supreme Court. *See* Transcript of Argument at 19-22, *Mesa*, 57 U.S.L.W. at 4203.

brought in good faith.[230] Finally, allowing removal of harassment claims could well provide the official with two bites at the procedural apple. An unsuccessful attempt at removal might not collaterally estop pre-trial or post-trial petitions for habeas corpus.[231]

The different procedure and burden of proof required in habeas corpus proceedings resolves these problems. Although it still would be possible to bootstrap the merits into the hearing on the petition, the burden would shift to the official to make at least a prima facie case of harassment at the hearing.[232] Officials should have to meet this higher burden when seeking to invade state sovereignty before trial. Officials will be reluctant to take the time and effort to file a writ petition unless they are serious. Conversely, legitimate claimants will elect habeas corpus because they will be released immediately after prevailing upon their petition; an official seeking removal must first prevail at an evidentiary hearing, and then prevail again at trial.

VI. CONCLUSION

The legislative history of section 1442(a) indicates that a federal defense is always required for removal of civil and criminal cases. Section 1442(a) is a product of the Supremacy Clause and is coextensive with it. It is based on the supremacy of federal law—not the supremacy of federal officials. Congress clearly separated the private and official character of federal officials as required by article III, section 2, and ensured that only those cases involving federal law could be removed.

The Supreme Court traditionally assumed that a federal defense was required for removal. The Court ran into trouble only after it confused the federal defense requirement with the subordinate issue of how such defenses are put into issue. Subsequent courts compounded the error by failing to return to the intent of Congress.

The Court's decision in *Mesa* is a glass half full—it restores the

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230. Furthermore, there is a legitimate concern that federal judges are more likely to favor federal officials over state law enforcement officials where the only result of such favoritism is a jury trial on the merits. This is not as great a concern in a habeas corpus proceeding because the burden is higher and federal judges will be more careful when they must decide whether to find formally that a state harassed a federal official.

231. It would seem fair to disallow a petition for the writ after an unsuccessful attempt to remove a claim of harassment, at least to the extent of preventing a pretrial writ petition. However, the official could still raise the harassment claim after trial by way of habeas corpus. Requiring pretrial use of the writ would presumably foreclose such post-trial attacks.

232. *See supra* notes 217-21.

federal defense requirement, but does not address the harassment issue. That issue can only be resolved by recourse to another remedy, the writ of habeas corpus. Requiring federal officials to plead a federal defense for removal pursuant to section 1442(a)(1) does not preclude those officials from presenting harassment claims through a petition for habeas corpus.

This scheme attempts to balance the supremacy of federal law with the right of states to enforce their own laws. The removal and habeas corpus procedures cut with a scalpel, not a meat ax. They excise only those cases implicating the Supremacy Clause; they do not create traffic courts for federal employees. This more than an elegant solution—it is the solution originally intended by Congress.